ENTERED ON DOCKET
3-20-96

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELMER LEON CHAPLIN, Plaintiff, vs. BUILDERS TRANSPORT, INC., and THE INSURANCE COMPANY OF NORTH AMERICA, Defendants, and FARMERS INSURANCE COMPANY, INC. Intervenor.	)	Case No. 94-C-1197-J

FILED
MAR 19 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

JUDGMENT

NOW on this 15th day of March, 1996, the captioned matter came before this Court for hearing. Present were Plaintiff Elmer Leon Chaplin and his attorneys Terry L. Weber and Elizabeth A. Maggi of Howard and Widdows, P.C. The Defendant Builders Transport, Inc., was represented by William A. Fiasco of the law firm of Atkinson, Haskins, Nellis, Boudreaux, Holeman, Phipps & Brittingham. Intervener Farmers Insurance Company, Inc. was represented by Jacqueline Haglund of Haglund and Associates.

The Court after hearing the evidence and arguments of counsel finds in favor of Plaintiff Elmer Leon Chaplin for the amount of two hundred thousand & no/100 dollars ($200,000.00) as well as interest, costs and attorneys' fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff Elmer Leon Chaplin recover from the Defendant Builders Transport, Inc., the sum of two hundred thousand & no/100 dollars ($200,000.00), together with prejudgment interest in the amount of nine hundred twenty-four & 32/100 dollars ($924.32), post-judgment interest from March 15, 1996, until paid in full at the rate of 5.25% as provided by law and attorneys' fees incurred from and after February 7, 1996, reasonable and necessary to obtain this judgment, and attorneys' fees to be incurred in the collection of the judgment. Attorneys' fees Application to be made within ten (10) days after collection of the judgment.

Dated this 19 day of March, 1996.

SAM A. JOYNER
UNITED STATES MAGISTRATE JUDGE

PREPARED BY:

Terry L. Weber, OBA #10149
-- Of Counsel --
Elizabeth A. Maggi, OBA #11911
2021 South Lewis, Suite 470
Tulsa, OK 74104
(918) 744-7440
Attorneys for Plaintiff

ENTERED ON DOCKET
DATE 3-20-96

FILED
MAR 19 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DOYLE ALLAN CLAGG,

Plaintiff,

v.

JOE SMITH, Rogers County Assistant District Attorney,

Defendant.

Case No. 95-C-375-H

ORDER

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge (Docket #4).

In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), any objections to the Report and Recommendation must be filed within ten (10) days of the receipt of the report. The time for filing objections to the Report and Recommendation has expired, and no objections have been filed.

Based on a review of the Report and Recommendation of the Magistrate Judge, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge (Docket #4). Plaintiff's Complaint is hereby dismissed.

IT IS SO ORDERED.

This 19TH day of March, 1996.

Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET
3-20-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JESSIE D. MCNATT,

Plaintiff,

v.

SHIRLEY CHATER, Commissioner of the Social Security Administration,

Defendant.

FILED
MAR 19 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

CASE NO. 95-C-892-J

ORDER

Upon the motion of the defendant, Commissioner of Health and Human Services, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 6 of section 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 1383(c)(3).

DATED this 19th day of March, 1996.

S/Sam A. Joyner
U.S. Magistrate

SAM A. JOYNER
UNITED STATES MAGISTRATE JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

Wyn Dee Baker

WYN DEE BAKER, OBA #465
Assistant United States Attorney
333 W. Fourth St., Suite 3460
Tulsa, OK 74103-3809

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 19 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

NOISE REDUCTION, INC., a corporation, and SOUND SOLUTION, L.P., a Delaware Limited Partnership,

Plaintiffs,

v.

NORDAM CORPORATION, a corporation, SIEGFRIED, INC., a corporation, NORDAM, a general partnership, UNITED TECHNOLOGIES CORPORATION, PRATT & WHITNEY GROUP, COMMERCIAL ENGINE BUSINESS, a corporation,

Defendants.

No. 92-C-913-C

ENTERED ON DOCKET
DATE MAR 20 1996

ORDER CLOSING CASE

There comes before the Court the oral application of the parties to close the proceeding for the reason that both the original action pending in the Northern District of Illinois and this miscellaneous proceeding for discovery disputes have been concluded or resolved. For such reason, the Court FINDS and it is hereby ORDERED that this miscellaneous proceeding is hereby closed and all proceedings dismissed unless any party files an objection, request for hearing and application to reopen this procedure within ten (10) days after service of this order.

DATED this 19 day of Mar., 1996.

(Signed) H. Dale Cook

H. DALE COOK
JUDGE OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 19 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

DONALD NEEDHAM, an individual, and NEECO, INC., an Oklahoma corporation,

Plaintiffs,

vs.

WEDTECH (USA), INC., a Delaware corporation, and WEDTECH, INC., a Canadian corporation,

Defendants.

No. 95-C-1211-C

ENTERED ON DOCKET
DATE MAR 20 1996

ORDER

Currently pending before the Court is the motion filed by defendants seeking dismissal of the instant action for lack of jurisdiction, pursuant to Rule 12(b)(1) of the F.R.C.P. and 28 U.S.C. § 1332.

On December 11, 1995, plaintiffs filed the present action against defendants, invoking diversity jurisdiction pursuant to 28 U.S.C. § 1332. On January 2, 1996, defendants filed motions to dismiss, citing lack of subject matter jurisdiction. On January 26, the Court entered a minute order providing the parties with additional time to conduct discovery respecting the jurisdictional issue, and setting deadlines for the filing of additional documents and authorities.

Plaintiffs are citizens and residents of Oklahoma. Defendant, Wedtech Canada, is a foreign corporation doing business in Canada. Defendant, Wedtech (USA), is incorporated in Delaware, and is authorized under the laws of Oklahoma to conduct business in Oklahoma. Wedtech (USA) conducts operations in Dewey, Oklahoma. The issue presented herein is whether complete diversity

exists between the parties. Plaintiffs contend that both defendants are incorporated and have their principal place of business outside Oklahoma. Defendants contend that Wedtech (USA) has its principal place of business in Oklahoma, and, therefore, complete diversity does not exist between the parties.

As an initial matter, the Court recognizes that since defendants challenge the Court's subject matter jurisdiction, plaintiffs bear the burden of proving its existence. Amoco Rocmount Co. v. Anschutz Corp., 7 F.3d 909, 914 (10th Cir.1993), cert. denied, 114 S.Ct. 1057 (1994). Plaintiffs attempt to invoke diversity jurisdiction pursuant to 28 U.S.C. § 1332, which provides that district courts shall have original jurisdiction of all civil actions where the amount in controversy exceeds $50,000 and is between citizens of different states. Section 1332(c)(1) provides that a corporation shall be deemed to be a citizen of any state in which it is incorporated and of the state where it has its principal place of business.

The Tenth Circuit in Amoco stated that the determination of a corporation's principal place is a question of fact. Id. In resolving the issue of where a corporation's principal place of business is located, the Tenth Circuit adopted the "total activity" test. The "total activity" approach considers several factors, such as the location of the corporation's administrative offices, nerve center, production facilities, employees, etc. Id. The test then balances these factors in light of the specific facts of each case. The "determination of a corporation's principal place of business does not hinge on one particular facet of corporate operations, but on the total activity of the company considered as a whole." Id.

Plaintiffs assert that the total activities of Wedtech (USA) demonstrate that the principal place of business of Wedtech (USA) is located outside Oklahoma. Plaintiffs point to Wedtech (USA)'s

Certificate of Qualification filed with the Oklahoma Secretary of State, in which Wedtech (USA) indicates that its principal of business is located in Ontario, Canada. Plaintiffs also point to the fact that Wedtech (USA) and Wedtech Canada share the same president and the same directors. Some of Wedtech Canada's officers also serve as officers of Wedtech (USA). Plaintiffs also assert that Wedtech (USA) and Wedtech Canada are substantially linked to one another and that Wedtech (USA) could not survive without Wedtech Canada's financial support and continued assistance. Additionally, Wedtech Canada owns all the stock of Wedtech (USA), and Wedtech Canada guaranteed Wedtech (USA)'s long-term debt. Wedtech Canada provided Wedtech (USA) with non-interest bearing loans with no fixed term of repayment. Expenses of Wedtech (USA) are paid from a Wedtech Canada account at a bank in Canada. Plaintiffs further contend that Wedtech Canada has considerable control over Wedtech (USA)'s operations; Wedtech Canada has set prices for Wedtech (USA) products and Wedtech Canada approves color matching for Wedtech (USA). Plaintiffs argue that Wedtech Canada and Wedtech (USA) are so intricately related that they are in essence one entity, with their principal place of business outside of Oklahoma.

Conversely, defendants point to the fact that Wedtech (USA)'s offices, plant, production facilities and assets are located in Oklahoma. Wedtech (USA)'s employees live in Oklahoma. Wedtech (USA) maintains separate corporate records in Oklahoma, and its employees are paid from a bank in Oklahoma. Wedtech (USA) issues purchase orders and invoices from Dewey, Oklahoma. Defendants represent that Wedtech (USA) competes in a market separate from Wedtech Canada. Wedtech (USA) enters into its own contracts, and maintains its own audited financial statements. Defendants acknowledge that management decisions are made by John Lefas, the president of Wedtech (USA) and Wedtech Canada, although most routine decisions are made in Oklahoma.

Defendants further acknowledge that some accounting and managerial services are provided by Wedtech Canada to Wedtech (USA). Furthermore, the asset purchase agreement at issue in this case was executed in Oklahoma.

Based upon the foregoing, plaintiffs have not convinced the Court that Wedtech (USA)'s principal place of business is located outside Oklahoma. Plaintiffs offer much detail concerning the corporate structure of Wedtech (USA) and its interrelation with Wedtech Canada. Plaintiffs have demonstrated that Wedtech Canada exercises considerable managerial control over Wedtech (USA) and that Wedtech (USA) is dependent upon Wedtech Canada for its very existence. However, the Court concludes that such a showing does not establish that Wedtech (USA)'s principal place of business is located outside Oklahoma under the "total activity" test. That test does not focus solely upon the amount of control or influence exerted over a subsidiary by its foreign parent, nor does it focus primarily upon where corporate decisions are made. If the "total activity" test focused solely upon such areas, the test would essentially merge with the "nerve center" test, an approach specifically rejected by the Tenth Circuit in Amoco. Rather, the "total activity" test focuses not only upon where a corporation's nerve centered is located, but also upon where its production facilities, plant, employees, etc., are located. Demonstrating that Wedtech Canada owns all the stock of Wedtech (USA), that Wedtech Canada offers financial and managerial support to Wedtech (USA), or that Wedtech (USA) has previously indicated that its principal place of business is in Canada, is not dispositive of the jurisdictional issue.

It is clear that Wedtech (USA) conducts its daily operations in Oklahoma. Wedtech (USA) maintains its production facilities in Oklahoma, it employs Oklahoma residents, it pays its Oklahoma employees from a bank account located in Oklahoma, it enters into contracts and agreements in

Oklahoma, its assets are located in Oklahoma, and its offices are located in Oklahoma. John Lefas, president of both defendants, testified that Dewey, Oklahoma, is the worldwide technical service center for both Wedtech (USA) and Wedtech Canada. Although Wedtech (USA) and Wedtech Canada are associated to a certain degree, it is undisputed that Wedtech (USA) is legally recognized as a separate corporate entity from Wedtech Canada. As such, Wedtech (USA) is capable of having its own principal place of business separate and apart from its parent, Wedtech Canada. The Court therefore reaches the inescapable conclusion that, under the "total activity" test, Wedtech (USA) conducts the majority of its operations in Oklahoma, and, therefore, its principal place of business is located in Oklahoma.

Plaintiffs further allege that Wedtech (USA), being a wholly-owned subsidiary of Wedtech Canada, is nothing more than the alter ego of its parent. Consequently, plaintiffs argue that jurisdiction should be determined with respect to Wedtech Canada's principal place of business, rather than Wedtech (USA)'s. This "alter ego" argument has been considered and rejected by several federal courts.

The general rule is well-established that a subsidiary corporation which is incorporated as a separate entity from its parent is considered to have its own principal place of business. Topp v. Compair Inc., 814 F.2d 830, 835 (1st Cir.1987); Schwartz v. Electronic Data Systems, Inc., 913 F.2d 279, 283 (6th Cir.1990). This rule applies even when a parent owns all the stock of the subsidiary and exercises control over the subsidiary's operations. Schwartz, 913 F.2d at 283. Moreover, "where the corporate separation between a parent and subsidiary, 'though perhaps merely formal,' is 'real' and carefully maintained, the separate place of business of the subsidiary is recognized in determining jurisdiction, even though the parent corporation exerts a high degree of

control through ownership or otherwise." Topp, 814 F.2d at 836 (quoting Lurie Co. v. Loew's San Francisco Hotel Corp., 315 F.Supp. 405, 410 (N.D.Cal.1970), and citing Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 337 (1925)). "When formal separation is maintained between a corporate parent and its . . . subsidiary, federal court jurisdiction over the subsidiary is determined by that corporation's citizenship, not the citizenship of the parent." Schwartz, 913 F.2d at 283. Here, the corporate separation between Wedtech Canada and Wedtech (USA) is real; it is "not pure fiction." Cannon Mfg. Co., 267 U.S. at 337. "Generally, the separate corporate status of a parent corporation and its subsidiary will be recognized. This is true even where the parent corporation owns all the shares in the subsidiary and the two enterprises share directors and officers." McKinney v. Gannet Co., Inc., 817 F.2d 659, 665-666 (10th Cir.1987). Thus, "even if the parent corporation exerts a high degree of control . . ., and even if the separateness is perhaps only formal, the subsidiary's place of business is controlling for diversity purposes if the corporate separation is real and carefully maintained." U.S.I. Properties Corp. v. M.D. Construction Co., 860 F.2d 1, 7 (1st Cir.1988), cert. denied, 490 U.S. 1065 (1989).

The "alter ego" exception to the general rule has thus not found support in federal decisions. Plaintiffs have not cited any cases in which the "alter ego" exception has been used to create subject matter jurisdiction in a diversity case by imputing the parent's principal place of business to the subsidiary. Indeed, the case law supports the exact opposite view. "The federal district and circuit courts have repeatedly upheld the independence of the subsidiary . . . while giving lip service to the alter ego doctrine." Beightol v. Capitol Bankers Life Ins.Co., 730 F.Supp 190, 193 (E.D.Wis. 1990). With respect to jurisdictional issues, the alter ego doctrine has instead been employed for the narrow purpose of *limiting* diversity jurisdiction, in order to effectuate the congressional intent of minimizing

and reducing the caseload of federal courts based upon diversity. Id. at n.2 (citing Freeman v. Northwest Acceptance Corp., 754 F.2d 553, 558-559 (5th Cir.1985) (applying alter ego doctrine to diversity jurisdiction case, but limiting holding to those instances in which imputing the citizenship of a subsidiary to its parent under the doctrine serves the congressional purpose of *denying* federal diversity jurisdiction)). In I.A. Olson Co. v. City of Winona, 818 F.2d 401, 414 (5th Cir.1987), the Fifth Circuit held that "the alter ego doctrine may not be used to create diversity jurisdiction by ignoring the principal place of business of a subsidiary corporation and imputing to it the principal place of business of the parent." Furthermore, cases "that have found the corporate parent's citizenship to control have not rejected the 'general rule.' Rather, in those cases the courts have determined on the basis of particular facts that a subsidiary's principal place of business was the same as that of the corporate parent, or that the subsidiaries were not actually separate corporate entities." Schwartz, 913 F.2d at 283-284. The Eleventh Circuit in Fritz v. American Home Shield Corp., 751 F.2d 1152, 1153 (11th Cir.1985), also rejected plaintiffs' alter ego argument, stating that this "novel argument has no merit under the clear statutory language and well-settled case law." Hence, when "a subsidiary chooses to be incorporated separately from its parent, for whatever reason, it is treated as an independent entity for purposes of determining federal court jurisdiction." Schwartz, 913 F.2d at 283. In Glenny v. American Metal Climax, Inc., 494 F.2d 651, 655 (10th Cir.1974), the Tenth Circuit stated that a district court is "not compelled to retain jurisdiction in a case where diversity is satisfied only by piercing the corporate veil."

The Court therefore rejects plaintiffs' claim that Wedtech (USA) is merely the alter ego of Wedtech Canada, and the Court will not permit Wedtech Canada's principal place of business to be imputed to Wedtech (USA) to satisfy the complete diversity requirement. Wedtech (USA) is its own

legal entity with its own principal place of business. It is well-settled that Congress intended to restrict and limit federal diversity jurisdiction, and this intent is further evinced by providing for multiple corporate citizenship in 28 U.S.C. § 1332(c). Freeman, 754 F.2d at 558. "This statute . . . [has] consistently been held to require complete diversity of citizenship. That is, diversity jurisdiction does not exist unless each defendant is a citizen of a different State from each plaintiff. . . . It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction . . . must be neither disregarded nor evaded." Owen Equipment and Erection Co. v. Kroger, 437 U.S. 365, 373-374 (1978). Moreover, the "jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation." American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17 (1951). Congress' requirement of complete diversity would certainly be thwarted and evaded if this Court were to give effect to the alter ego doctrine espoused by plaintiffs. For purposes of diversity jurisdiction, the alter ego doctrine cannot be used to create subject matter jurisdiction by imputing one entity's principal place of business to another entity.

Accordingly, since the Court concludes that Wedtech (USA)'s principal place of business is in Oklahoma, and since the Court further rejects plaintiffs' argument that Wedtech (USA) is merely the alter ego of Wedtech Canada for diversity purposes, defendants' motions to dismiss based upon lack of complete diversity jurisdiction are hereby GRANTED.

IT IS SO ORDERED this 15th day of March, 1996.

H. Dale Cook
U.S. District Judge

3-20-96

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 19 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

MELISSA F. MARTIN, surviving spouse of REX L. MARTIN, deceased,

Plaintiff,

v.

MISSOURI PACIFIC RAILROAD COMPANY d/b/a UNION PACIFIC RAILROAD COMPANY, a foreign corporation,

Defendant.

Case No. 95-C-289-H

ORDER

This matter comes before the Court on Plaintiff's Motion to Remand (Docket #2). Plaintiff originally brought this action in Mayes County District Court. Her petition alleges a cause of action for negligence and requests compensatory damages "in excess of $10,000" and punitive damages "in excess of $10,000."[1] Defendant removed the case to this Court on the basis of diversity jurisdiction. Plaintiff has moved to remand, claiming that diversity jurisdiction does not exist.

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed $50,000. 28 U.S.C. § 1332(a). The Tenth Circuit has recently clarified the analysis which a district court should undertake in determining whether an amount in controversy is greater than $50,000. The Tenth Circuit stated:

> [t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. (citation omitted) The burden is on the party requesting removal to set forth, in the notice of removal itself, the

---

[1] In Oklahoma, the general rules of pleading require that:

> [e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars ($10,000) shall, without demanding any specific amount of money, set forth only that amount sought as damages is in excess of Ten Thousand Dollars ($10,000), except in actions sounding in contract.

12 Okla. Stat. Ann. § 2008(2).

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"underlying facts supporting [the] assertion that the amount in controversy exceeds $50,000." Moreover, there is a presumption against removal jurisdiction.

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir.), cert. denied, 116 S. Ct. 174 (1995) (citation omitted).

In Laughlin, the plaintiff originally brought his action in state court. Defendant removed to federal court based on diversity jurisdiction. The court granted summary judgment to defendant, and plaintiff appealed. On appeal, the Tenth Circuit raised the issue of subject matter jurisdiction and remanded the case to state court. Neither the petition nor the notice of removal had established the requisite jurisdictional amount. The petition alleged that the amount in controversy was "in excess of $10,000" for each of two claims. The notice of removal did not refer to an amount in controversy, but did contain a reference to the removal statute, 28 U.S.C. § 1441. In its brief on the issue of jurisdiction, Kmart set forth facts alleging that, at the time of removal, the amount in controversy was well above the jurisdictional minimum of $50,000. However, Kmart failed to include those facts in its notice of removal.

The Tenth Circuit held that:

> Kmart's economic analysis of Laughlin's claims for damages, prepared after the motion for removal and purporting to demonstrate the jurisdictional minimum, does not establish the existence of jurisdiction at the time the motion was made. Both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice.

Laughlin, 50 F.3d at 873.

In Laughlin, Kmart attempted to rely on Shaw v. Dow Brands, Inc., 994 F.2d 364 (7th Cir. 1993). The Shaw court held that "the plaintiff had conceded jurisdiction because he failed to contest removal when the motion was originally made, and because he stated in his opening appellate brief that the amount in controversy exceeded $50,000." The Tenth Circuit distinguished Shaw, stating:

> [w]e do not agree, however, that jurisdiction can be "conceded." Rather, we agree with the dissenting opinion that "subject matter jurisdiction is not a matter of equity or of conscience or of efficiency," but is a matter of the "lack of judicial power to decide a controversy."

Laughlin, 50 F.3d at 874 (citation omitted).

In the instant case, neither the allegations in the petition nor the allegations in the removal documents establish the requisite jurisdictional amount. Plaintiff's petition seeks actual damages "in excess of $10,000" and punitive damages "in excess of $10,000." Accordingly, the petition alleges damages "in excess of" $20,000. Furthermore, Defendant has not complied with the requirements of Laughlin in the removal documents. Specifically, Defendants offers only a conclusory statement that "[t]he matter in controversy, between Plaintiff and Defendant, exceeds Fifty Thousand and No/100ths Dollars ($50,000), exclusive of interests and costs." Notice of Removal at 2.

Where the face of the petition does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the removal documents, not only the defendant's good faith belief that the amount in controversy exceeds $50,000, but also facts underlying defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than $50,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction. Laughlin, 50 F.3d at 873. And the Tenth Circuit has clearly stated what is required to satisfy that burden. Because Defendant has not met its burden, as defined by the Laughlin court, this Court must grant Plaintiff's motion to remand.

The Court hereby grants Plaintiff's Motion to Remand (Docket # 12) and orders the Court Clerk to remand the case to District Court in and for Mayes County.

IT IS SO ORDERED.

This 19th day of March, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 19 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

RICHARD C. SCHRODER,

Plaintiff,

v.

PUROLATOR PRODUCTS, N.A., INC., LARRY CURTIS, AND GAINES WELLS,

Defendants.

Case No. 95 CV ~~958~~ 956 BU

ENTERED ON DOCKET
DATE MAR 20 1996

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a dismissal with prejudice of Plaintiff's causes of action in this case against Defendant, Purolator Products, N.A., Inc.

DATED this 13th day of March, 1996.

FRED C. CORNISH, INC.

Fred C. Cornish, Esq.
321 South Boston Avenue, Suite 917
Tulsa, OK 74103-3321
(918) 583-2284

ATTORNEY FOR THE PLAINTIFF

DOERNER, SAUNDERS, DANIEL & ANDERSON

BY: Kathy R. Neal

Kathy R. Neal, OBA No. 674
320 South Boston, Suite 500
Tulsa, OK 74103-3725
(918) 582-1211

ATTORNEYS FOR DEFENDANT, PUROLATOR PRODUCTS, N.A., INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 19 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

RICHARD C. SCHRODER,

Plaintiff,

v.

PUROLATOR PRODUCTS, N.A., INC., LARRY CURTIS, AND GAINES WELLS,

Defendants.

Case No. 95 CV 956 BU

DATE MAR 20 1996

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a dismissal with prejudice of Plaintiff's causes of action in this case against Defendant, Larry Curtis.

DATED this 12th day of March, 1996.

FRED C. CORNISH, INC.

Fred C. Cornish, Esq.
321 South Boston Avenue, Suite 917
Tulsa, OK 74103-3321
(918) 583-2284

ATTORNEY FOR THE PLAINTIFF

DOERNER, SAUNDERS, DANIEL & ANDERSON

BY:

Kathy R. Neal, OBA No. 674
320 South Boston, Suite 500
Tulsa, OK 74103-3725
(918) 582-1211

ATTORNEYS FOR DEFENDANT, LARRY CURTIS

FILED

MAR 19 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD C. SCHRODER,

Plaintiff,

v.

PUROLATOR PRODUCTS, N.A., INC., LARRY CURTIS, AND GAINES WELLS,

Defendants.

Case No. 95 CV ~~958~~ 956 BU

MAR 20 1996

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a dismissal with prejudice of Plaintiff's causes of action in this case against Defendant, Gaines Wells.

DATED this 14th day of March, 1996.

FRED C. CORNISH, INC.

Fred C. Cornish, Esq.
321 South Boston Avenue, Suite 917
Tulsa, OK 74103-3321
(918) 583-2284

ATTORNEY FOR THE PLAINTIFF

DOERNER, SAUNDERS, DANIEL & ANDERSON

BY: Kathy R. Neal

Kathy R. Neal, OBA No. 674
320 South Boston, Suite 500
Tulsa, OK 74103-3725
(918) 582-1211

ATTORNEYS FOR DEFENDANT, GAINES WELLS

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILE

MAR 18 199

Richard M. Lawrence, Cou
U.S. DISTRICT COUI

LUMIE L. MILNER,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of the Social Security Administration,

Defendant.

Civil Action No. 95-C-1057-W

ORDER

ENTERED ON DOCKET
DATE MAR 19 1996

Upon the motion of the defendant, Shirley S. Chater, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, IT IS HEREBY ORDERED that the complaint filed October 23, 1995, in the above-referenced case is dismissed.

DATED this 18th day of ~~January~~ March 1996.

JOHN LEO WAGNER
United States Magistrate Judge

6

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

FILED

MAR 18 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

RICHARD C. SCHRODER, Plaintiff,	)	
vs.	)	Case No. 95-C-956-BU
PUROLATOR PRODUCTS, N.A., INC., LARRY CURTIS, AND GAINES WELLS, Defendants.	)	

ENTERED ON DOCKET

DATE MAR 19 1996

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

FILED

MAR 18 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM AND EUNICE BRYANT, individually and as husband and wife,	)	
Plaintiffs,	)	
vs.	)	Case No. 95-C-681-BU
NEW COLEMAN HOLDINGS INC., formerly THE COLEMAN COMPANY, INC., a Kansas corporation, and FISHER-ROSEMOUNT SYSTEMS, INC. formerly FISHER CONTROLS, INC., a Delaware corporation,	)	
Defendants.	)	

ENTERED ON DOCKET
DATE MAR 19 1996

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiffs' action shall be deemed to be dismissed with prejudice.

Entered this 18th day of March, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 18 1996
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FRANCIS E. WILSON,

Plaintiff,

vs.

CITY OF BROKEN ARROW, MAYOR, and POLICE CHIEF,

Defendants.

Case No. 95-C-314-BU

ENTERED ON DOCKET
DATE MAR 19 1996

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 18th day of March, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
3-19-96

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 18 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

USAA CASUALTY INSURANCE COMPANY, Plaintiff, v. JEAN A. HOWARD; ROLLIE A. PETERSON; and SUSAN P. PETERSON, Defendants.	)	Case No. 94-C-412-H

JUDGMENT

This Court entered an order on March 18, 1996, granting summary judgment in favor of Plaintiff USAA Casualty Insurance Company.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Plaintiff and against the Defendants.

IT IS SO ORDERED.

This 18TH day of March, 1996.

Sven Erik Holmes
United States District Judge

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ENTERED ON DOCKET
DATE 3-19-96

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 18 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

USAA CASUALTY INSURANCE COMPANY,

Plaintiff,

v.

JEAN A. HOWARD; ROLLIE A. PETERSON; and SUSAN P. PETERSON,

Defendants.

Case No. 94-C-412-H

ORDER

This matter comes before the Court on Plaintiff's Motion for Summary Judgment (Docket # 7).

This case arises out of another case before the Court, Peterson v. Walentiny, 93-C-399-H ("the underlying action"). Rollie A. Peterson brought the underlying action against his ex-wife, Jean A. Howard, alleging claims against Ms. Howard that arose out of custody proceedings in which she accused him of sexually abusing their daughter. Following the Court's ruling on Ms. Howard's summary judgment motion, Mr. Peterson's malicious prosecution claim is the only surviving claim against Ms. Howard in the underlying action.

Prior to the events giving rise to the underlying action, Ms. Howard purchased a Homeowners Policy from Plaintiff USAA Casualty Insurance Company ("USAA"). USAA subsequently brought this action, seeking a declaratory judgment that it was not obligated to defend Ms. Howard in the underlying action or pay judgment resulting therefrom.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

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> [t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment."). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250.

The Homeowners Policy provides:

Coverage E -- Personal Liability

> If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies, we will:
>
> 1. pay up to our limit of liability for the damages for which the insured is legally liable; and
>
> 2. provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the occurrence equals our limit of liability.

Pl.'s Mot. for Summ. J. at ex. B. The policy explicitly adds that the above coverage does not apply "to bodily injury or property damage . . . which is expected or intended by the insured." Id.

Under Oklahoma law, malice is an essential element of a malicious prosecution claim. Meyers v. Ideal Basic Indus., Inc., 940 F.2d 1379, 1383 (10th Cir. 1991) (citing Young v. First State Bank, 628 P.2d 707, 709 (Okl. 1981)). "Malice is defined as the intentional doing of a wrongful act without justification or excuse." Bennett v. City Nat'l Bank & Trust Co., 549 P.2d 393, 397 (Okl. Ct. App. 1975) (citing Mangum Elec. Co. v. Borden, 222 P. 1002 (Okl.) (emphasis added)). The Court thus concludes that the policy exclusion above clearly applies to a claim for malicious prosecution.

Ms. Howard contends that the plaintiff in the underlying action need not prove actual malice but may prevail against her on the basis of "implied malice." Upon this basis, she argues that the intentional tort exception to the policy is inapplicable because Mr. Peterson may not offer actual proof of her intent. Even if Ms. Howard is correct in claiming that Oklahoma law recognizes the distinction between actual and implied malice, the Court finds that this distinction does not affect this case. Implied malice is a method of fulfilling the intent requirement, not a waiver of that requirement. Thus, because the injuries allegedly arising from Ms. Howard's are, by definition, intended, they are not covered by the Homeowners Policy. USAA therefore has no obligation to defend Ms. Howard in the underlying action or pay any judgment arising therefrom.

Accordingly, Plaintiff's Motion for Summary Judgment is hereby granted (Docket #7).

IT IS SO ORDERED.

This 18TH day of March, 1996.

Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET
DATE 3-19-96

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 18 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

TRINITY UNIVERSAL INSURANCE COMPANY,

Plaintiff,

v.

BRUCE J. BROUSSARD; G&L INVESTMENTS, LTD; and BITEC, INC.,

Defendants.

Case No. 94-C-623-H

JUDGMENT

This Court entered an order on March 18, 1996, granting summary judgment in favor of Plaintiff Trinity Universal Insurance Company.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Plaintiff and against the Defendants.

IT IS SO ORDERED.

This 18TH day of March, 1996.

Sven Erik Holmes
United States District Judge

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ENTERED ON DOCKET
DATE 3-19-96

FILED
MAR 18 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TRINITY UNIVERSAL INSURANCE COMPANY,

Plaintiff,

v.

BRUCE J. BROUSSARD; G&L INVESTMENTS, LTD; and BITEC, INC.,

Defendants.

Case No. 94-C-623-H

ORDER

This matter comes before the Court on Plaintiff's Motion for Summary Judgment (Docket # 13).

Trinity Universal Insurance Company ("Trinity") brought this action seeking a declaratory judgment that it owes no coverage to Defendant Broussard for claims made against him by Defendants G&L Investments, Ltd., and BITEC, Inc. The following facts are undisputed.

1. Trinity Universal Insurance Company issued policy number GL7476716 to Bruce Broussard, d/b/a Greater Tulsa Contractors. The policy was in effect from July 1, 1989 through July 1, 1991.

2. On or about January 20, 1990, G&L Investments entered into a contract with Mr. Broussard to provide a new roof for the Ross-Martin Building in Tulsa. Mr. Broussard completed the work on the building on or about February 20, 1990.

3. The Ross-Martin Building is owned by G&L Investments, Ltd., an Oklahoma Limited Partnership ("G&L"). It is managed by Justin Gardner of Gardner Management Co., Oklahoma City.

4. The Ross-Martin Building roof leaks.

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5. The roof installed by Mr. Broussard does not include a base sheet recommended by BITEC.

6. A written contract for the roof work was signed by Mr. Broussard which contained a warranty for all materials and labor.

7. Both BITEC, by its employee Larry Easterling, and Mr. Broussard inspected the Ross-Martin Building after the roof was installed and approved the job.

8. A written warranty was delivered by BITEC to G&L after the roof was installed.

9. The roof materials used were manufactured by BITEC.

10. G&L has filed case number CJ-93-05119 in the District Court of Tulsa County against Mr. Broussard and BITEC. G&L alleges breach of contract, breach of written warranty, breach of the implied warranty of merchantability, pre-contract misrepresentations by both defendants, negligence of Mr. Broussard in the installation of the roof, negligence of BITEC in failing to conduct a proper post-installation of the roof job and discover Mr. Broussard's work, and waiver of disclaimer provisions in the BITEC warranty.

11. Trinity has defended Mr. Broussard in the state court action from its beginning pursuant to reservation of rights letters dated January 28, 1994 and June 29, 1994.

12. In the Tulsa County action, G&L seeks damages of $186,416 to install a new roof on the Ross-Martin Building as well as attendant costs for attorneys' fees, taxes, insurance and interest. G&L's claim for $186,416 is limited to repair or replacement of the roof installed by Mr. Broussard.

13. In the Tulsa County action, G&L alternatively seeks specific performance of the contract between G&L and Mr. Broussard by ordering Mr. Broussard to install a new roof on the Ross-Martin Building.

14. In the Tulsa County action, BITEC has filed a cross-claim against Mr. Broussard, asking that Mr. Broussard indemnify and hold BITEC harmless for any damages, injuries, or losses BITEC may be obligated to pay G&L in the principal amount.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment."). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250.

Although Mr. Broussard does not dispute the facts set forth above, he contends that summary judgment is inappropriate because "there are conflicting inferences which may reasonably be drawn from those facts." Def.'s Resp. to Pl.'s Mot. for Summ. J. at 1. The Court construes this as an argument that the terms of the insurance policy are ambiguous and such ambiguities should be resolved in his, the insured's, favor.

> The terms of the parties' contract, if unambiguous, clear, and consistent, are accepted in their plain and ordinary sense, and the contract will be enforced to carry out the intention of the parties as it existed at the time the contract was negotiated. The interpretation of an insurance contract and whether it is ambiguous is a matter of law for the Court to determine and resolve accordingly.

Dodson v. St. Paul Ins. Co., 812 P.2d 372, 376 (Okl. 1991). The policy in the instant case is clear and unambiguous, and the Court will thus interpret it as a matter of law.

Mr. Broussard purchased "Commercial General Liability Coverage" ("CGLC") from Trinity. The policy provides in pertinent part:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS - COVERAGES A AND B. This insurance applies only to "bodily injury" or "property damage" which occurs during the policy period. The "bodily injury" or "property damage" must be caused by an "occurrence." The "occurrence" must take place in the "coverage territory." We will have the right and duty to defend any "suit" seeking those damages.

Policy at 1. In interpreting a policy, however, "exclusions are read seriatim; each exclusion eliminates coverage and operates independently against the general declaration of insurance coverage and all prior exclusions by specifying other occurrences not covered by the policy." Dodson, 812 P.2d at 377. The policy at issue here lists several exclusions, including a provision that "[t]his

insurance does not apply to . . .'[p]roperty damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'" Id. at 3.

The policy defines "your work" as "[w]ork or operations performed by you or on your behalf." The term specifically includes "warranties or representations made at any time with respect to the fitness, quality, durability, performance of 'your work.'" Id. at 9. The policy further provides:

> "Products-completed operations hazard" includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> (1) Products that are still in your physical possession; or
> (2) Work that has not yet been completed or abandoned.

The Court finds that the state court action seeking compensation for the defective roof is based upon work performed by Mr. Broussard and that the alleged property damage arises out of that work. The Court further holds that the purported property damage is included in the "products-completed operations hazard." Thus, the Court concludes that the exclusion is applicable in the instant case.

The Tenth Circuit, in construing similar exclusions, has stated:

> Coverage under a [Commercial General Liability Policy] is not intended to extend to ordinary "business risks," such as those relating "to the repair or replacement of faulty work or products." The policy is not intended to serve as a performance bond or guaranty of goods or services. Its purpose is to protect the insured from liability for damages to property other than his own work or property that is caused by the insured's defective work or product.

Hartford Accident & Indem. Co. v. Pacific Mut. Life Ins. Co., 861 F.2d 250, 253 (10th Cir. 1988) (citations omitted).

Likewise, the Oklahoma Supreme Court has construed similar contract provisions in the following manner:

> "What is covered by the policy is defective workmanship which causes personal injury or property damage not excluded under some provision of the policy. So if the insured's breach of an implied warranty results in damage to property other than the insured's work or product which is excluded by [this exception], the policy would provide coverage. To hold otherwise would effectively covert the policy into a performance bond or guarantee of contractual performance and result in coverage for

> the repair and replacement of the insured's own faulty workmanship. This was not the intent and understanding of the parties at the time the policy was purchased."

Dodson, 812 P.2d at 378 (quoting Indiana Ins. Co v. DeZutti, 408 N.E.2d 1275, 1279 n.1 (Ind. 1980)).

Applying the rationale in the above-cited cases, it is clear that the exclusion here also involves this "business risk" exception. The Court notes that the damages sought by G&L in the state court action are limited to the cost of repairing or replacing the roof installed by Mr. Broussard or, alternatively, specific performance of the contract between G&L and Mr. Broussard by ordering Mr. Broussard to install a new roof on the Ross-Martin Building. G&L does not seek to recover for any damages occurring to other property as a result of the leaky roof. The Court therefore concludes that the policy explicitly excludes from coverage any damages sought in the state court action. Because Trinity is not obligated to pay any judgment rendered against Mr. Broussard in that action, Trinity has no obligation to defend against those allegations. See Leggett v. Home Indem. Co., 461 F.2d 257, 260 (10th Cir. 1972).

Accordingly, Trinity's Motion for Summary Judgment is hereby granted (Docket #13).

IT IS SO ORDERED.

This 18TH day of March, 1996.

Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET
DATE 3-19-96

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 18 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

WILLIAM C. CROW,

Plaintiff,

v.

ROBBINS & MYERS, INC., an Ohio corporation,

Defendant.

Case No. 95-CV-113-H

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by April 18, 1996, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 18TH day of MARCH, 1996.

Sven Erik Holmes
United States District Judge

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ENTERED ON DOCKET
DATE 3-19-96

FILED
MAR 18 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC.,

Plaintiff,

v.

NEWCO CORPORATION and ALLAN G. HOLMS,

Defendants.

Case No. 95-C-265-H

ORDER

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge (Docket # 28) (regarding Plaintiff's Motion for Sanctions (Docket # 25)).

Due to the discovery abuses by Defendant Newco Corporation, the Magistrate Judge recommends that judgment be granted to Plaintiff and against Defendant Newco in the amount of $124,699.89, plus pre-judgment interest in the amount of $59.09 per day after March 9, 1995, plus costs and a reasonable attorney's fee. Neither party has objected to the Report and Recommendation, and the time for such objections has expired.

Based on a review of the Report and Recommendation of the Magistrate Judge, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge in its entirety, granting Plaintiff's Motion for Sanctions.

IT IS SO ORDERED.

This 18th day of March, 1996.

Sven Erik Holmes
United States District Judge

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DATE 3-19-96
FILED
MAR 18 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC.

Plaintiff,

v.

NEWCO CORPORATION and ALLAN G. HOLMS,

Defendants.

Case No. 95-CV-265-H

JUDGMENT

This matter came before the Court on a Report and Recommendation by the United States Magistrate Judge. The Court duly considered the issues and rendered a decision in accordance with the order of March 18, 1996.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for the Plaintiff Thrifty Rent-A-Car System, Inc. in the amount of $124,699.89, plus pre-judgment interest in the amount of $59.09 per day after March 9, 1995, and against Defendant Newco Corporation.

IT IS SO ORDERED.

This 18TH day of March, 1996.

Sven Erik Holmes
United States District Judge

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3-19-96

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 18 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

WILLIAM C. CROW, Plaintiff, vs. ROBBINS & MYERS, INC., an Ohio corporation, Defendant.	)	Case No. 95-C-113-H

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, William C. Crow, by and through his undersigned attorney of record, Stephen L. Andrew, and the defendant, Robbins & Myers, Inc., by and through its undersigned attorney of record, R. Scott Savage, pursuant to the provisions of Rule 41(a)(1) of the Federal Rules of Civil Procedure, stipulate to the dismissal of the above-styled cause of action with prejudice.

STEPHEN L. ANDREW & ASSOCIATES

By _____

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D. Kevin Ikenberry, OBA #10354
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(918) 583-1111

ATTORNEYS FOR PLAINTIFF
William C. Crow

MOYERS, MARTIN, SANTEE,
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By _____

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Telecopier: (513) 443-6635
(513) 443-6637

ATTORNEYS FOR DEFENDANT
Robbins & Myers, Inc.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

3-19-96

UNITED STATES OF AMERICA, Plaintiff, vs. CHRIS LYNN TOWELL; DEANNA LYNN TOWELL; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	Civil Case No. 95-C 978H

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18th day of March, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, CHRIS LYNN TOWELL and DEANNA LYNN TOWELL, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, CHRIS LYNN TOWELL and DEANNA LYNN TOWELL, are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendants, CHRIS LYNN TOWELL and DEANNA LYNN TOWELL, were each served with process on December 12, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on October 12, 1995; and that the Defendants, CHRIS LYNN TOWELL and DEANNA LYNN TOWELL, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT FIVE (5), IN BLOCK SIX (6), IN BOWLIN ACRES, A SUBDIVISION TO THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.
AKA/5527 E. 4TH STREET., TULSA, OKLAHOMA 74112

The Court further finds that on June 14, 1989, the Defendant, CHRIS LYNN TOWELL, executed and delivered to FIRST MORTGAGE TRUST CORPORATION, d/b a FIRST MORTGAGE CORP. his mortgage note in the amount of $49,850.00, payable in monthly installments, with interest thereon at the rate of ten and one-half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, CHRIS LYNN TOWELL, A SINGLE PERSON, executed and delivered to FIRST MORTGAGE TRUST CORPORATION, d/b/a FIRST MORTGAGE CORP., a mortgage dated June 14, 1989, covering the above-described property. Said mortgage was recorded on June 15, 1989, in Book 5189, Page 556, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 28, 1989, FIRST MORTGAGE TRUST CORPORATION, DBA FIRST MORTGAGE CORP. assigned the above-described mortgage note and mortgage to Fleet Mortgage Corp. This Assignment of Mortgage was recorded on July 11, 1989, in Book 5193, Page 2575, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 23, 1993, Fleet Mortgage Corp. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development his successors and assigns. This Assignment of Mortgage was recorded on March 2, 1993, in Book 5480, Page 2498, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 28, 1993, the Defendants, CHRIS LYNN TOWELL and DEANNA LYNN TOWELL, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on August 19, 1993.

The Court further finds that on December 27, 1991, the Defendants, CHRIS LYNN TOWELL and DEANNA LYNN TOWELL, filed their petition for Chapter 7 relief in the United States Bankruptcy Court for the Northern District of Oklahoma, case number 91-04658-C, which was discharged on April 29, 1992, and was closed on June 29, 1992. The subject property was listed on schedule D.

The Court further finds that the Defendant, CHRIS LYNN TOWELL , made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, CHRIS LYNN TOWELL, is indebted to the Plaintiff in the principal sum of

$58,448.91, plus interest at the rate of 10.5 percent per annum from February 2, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $31.00 which became a lien on the property as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, CHRIS LYNN TOWELL and DEANNA LYNN TOWELL, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, CHRIS LYNN TOWELL, in the principal sum of $58,448.91, plus interest at the rate of 10.5 percent per annum from February 2, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus

any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $31.00, plus costs and interest, for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, CHRIS LYNN TOWELL, DEANNA LYNN TOWELL and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, CHRIS LYNN TOWELL, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $31.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

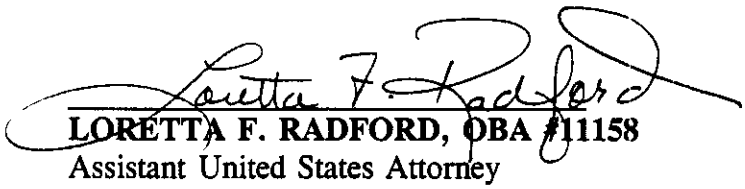
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ SVEN ERIK HOLMES

UNITED STATES DISTRICT JUDGE

APPROVED:
STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
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DICK A. BLAKELEY, OBA #852
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(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 978H

LFR/lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DATE 3-19-96

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID WAYNE LAWSON aka DAVID W. LAWSON aka DAVID WAYNE LAWSON, SR.; UNKNOWN SPOUSE, IF ANY OF DAVID WAYNE LAWSON aka DAVID W. LAWSON aka DAVID WAYNE LAWSON, SR.; JOANN MCGREW fka JOAN MARIE LAWSON aka JOANN M. LAWSON aka JOANN MARIE LAWSON; SOONER FEDERAL SAVINGS ASSOCIATION through its conservator RESOLUTION TRUST CORPORATION as receiver for SOONER FEDERAL SAVINGS; ROLLING OAKS AMENDED OWNERS ASSOCIATION INC.; CITY OF SAND SPRINGS, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

MAR 1 8 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 95-C 238H

ORDER

Upon the Amended Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Judgment entered on September 29, 1995 is hereby vacated, the Order of Sale issued by the Court

Clerk on October 19, 1995 is hereby vacated, and the subject action is dismissed without prejudice.

Dated this 18th day of MARCH, 1996.

S/ SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:lg

ENTERED ON DOCKET
3-19-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEROY H. CROFFUT; CHARLENE M. CROFFUT; MANUFACTURERS HANOVER CS CORPORATION successor by merger to Manufacturers Financial Services of Oklahoma, Inc; RUSSELL LEE MASSEY; DONNA FAYE MASSEY; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; TULSA ADJUSTMENT BUREAU, INC; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

MAR 1 8 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 95-C 743H

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

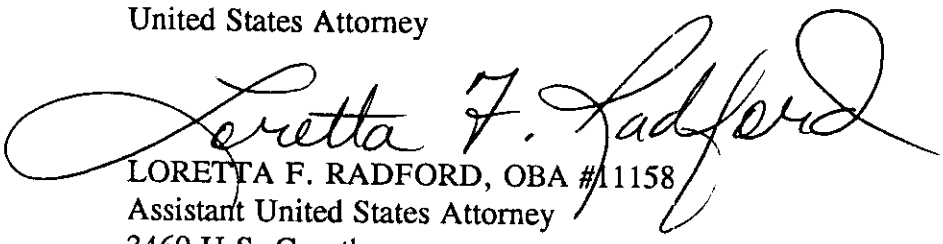
Dated this 18th day of MARCH, 1996.

S/ SVEN ERIK HOLMES

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
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(918) 581-7463

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 3-19-96

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DOVIE LEE FULBRIGHT fka Dovie Lee Johnson; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

MAR 18 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 95 C 1064H

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that the Judgment of Foreclosure entered herein on the 8th day of February, 1996 and the Order of Sale filed on the 29th day of February, 1996, are vacated and the action is hereby dismissed without prejudice.

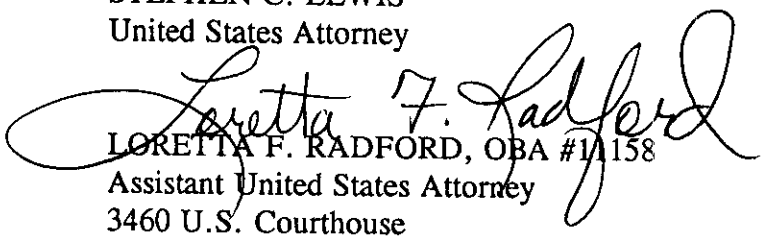
Dated this 18th day of March, 1996.

S/ SVEN ERIK HOLMES

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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(918) 581-7463

LFR:flv

ENTERED ON DOCKET
DATE 3-19-96

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 15 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

RANDOLPH JOHN AMEN,

Plaintiff,

v.

THE UNITED STATES of AMERICA,

Defendant.

No. 95-C-4-H

REPORT AND RECOMMENDATION

Defendant, United States of America, filed a Motion to Dismiss Plaintiff's action May 4, 1995. [Doc. No. 32-1]. By minute order dated October 16, 1995, the District Court referred the Motions to Dismiss for Report and Recommendation. [Doc. No. 27-1]. For the reasons discussed below, the United States Magistrate Judge recommends that Defendant's Motion to Dismiss be **GRANTED**.

I. SUMMARY OF PROCEDURAL HISTORY & FACTS

Plaintiff filed an action on January 4, 1995, naming the United States of America, and a variety of other parties including the Warren Commission, the Federal Bureau of Investigation, the Central Intelligence Agency, the State of Hawaii, the Hawaii Bar Association, the County of Los Angeles, the County of Ventura, the State of California, the National Syndicate of Cosa Nostra, the County of Dallas, Santa Monica College, El Dorado College, and several other individuals. Plaintiff filed a First Amended Complaint on February 13, 1995. Several parties filed motions to dismiss in "response" to the complaint.

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By Order dated June 4, 1995, the District Court dismissed all of the Defendants, except the United States of America based on Fed. R. Civ. P. 20(a) which permits joinder of more than one defendant for causes of action arising out of the same transaction and occurrence and involving common issues of law or fact. Consequently, only the causes of action asserted against the United States of America remain.[1/]

On May 4, 1995, the United States of America filed a Motion to Dismiss. Defendant asserted that Plaintiff's complaint failed to comply with Fed. R. Civ. P. 8(a) by not providing a short and plain statement of Plaintiff's cause of action, that Plaintiff's complaint failed to state a basis for federal jurisdiction, that Plaintiff's 42 U.S.C. § 1983 claims could not be asserted against the Defendant, that Plaintiff failed to properly serve Defendant, that Plaintiff's claims were barred by the statute of limitations, and that Plaintiff's complaint was frivolous. Plaintiff filed a Motion in Opposition to Defendant's Motion to Dismiss on June 26, 1995. Defendant filed a reply brief on July 3, 1995.

II. 42 § 1983 (Claim Nos. One and Two)

Plaintiff asserts, in his first claim for relief, that the Defendant, while acting under "color of law" denied Plaintiff's right to free speech under the First

---

[1/] Plaintiff filed a motion to file a second amended complaint on June 26, 1995, requesting permission to "re-join or file separate suits for those Defendants which could not be permissibly joined under FRCP 20." By Order dated June 28, 1995, the District Court denied permission to Plaintiff to file the second amended complaint. Plaintiff filed a second motion to file a second amended complaint on September 11, 1995.

Amendment.[2/] Plaintiff asserts that this cause is actionable under 42 U.S.C. § 1983 ("Section 1983"). In his second claim for relief Plaintiff alleges that Defendant violated Plaintiff's Fourteenth Amendment[3/] due process rights while acting under "color of law," in violation of Section 1983. Defendant asserts that Plaintiff's Section 1983 actions should be dismissed because Section 1983 permits causes of action only for individuals deprived of constitutional rights by officials acting under color of state law.

Plaintiff, in his response to the Motion to Dismiss states that "[as to the 'color of state law' argument, see Second Amended Complaint[4/] wherein federal officials . . . are named as having engaged in negligent or wrongful acts or omissions" under the FTCA[5/] and the Freedom of Information Act.[6/] Plaintiff's response acknowledges that

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[2/] Plaintiff's first claim for relief asserts that Defendants the United States, the "States of Hawaii," and California "while acting under color of state or federal law" denied Plaintiff his First and Fourteenth Amendment rights, in violation of 42 U.S.C. § 1983. The Court previously dismissed all Defendants with the exception of the United States. Consequently, only Plaintiffs allegations involving actions/inactions of the United States remain.

[3/] The Fourteenth Amendment is not the appropriate "due process" amendment for asserting actions by the federal government. The Fourteenth Amendment applies to state governments. See, e.g., District of Columbia v. Carter, 409 U.S. 418, 423-25 (1973).

[4/] Although Plaintiff refers to his "second amended complaint," the Court has not granted permission to Plaintiff to file a second amended complaint. The most recent complaint filed by Plaintiff is his first amended complaint, filed February 13, 1995.

[5/] The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 *et seq.*, provides that the United States may be sued in tort under certain circumstances. It is discussed in greater detail, below.

[6/] See 6 U.S.C. § 552.

Plaintiff's cause of action under Section 1983 is for actions of Defendant under federal law.[7/]

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (emphasis added). In Campbell v. Amax Coal Co., 610 F.2d 701 (10th Cir. 1979), the Tenth Circuit, in affirming the dismissal of a Section 1983 claim noted that

> appellants' complaint fails to state a claim under § 1983, which statute does not apply to federal officers acting under color of federal law.

Id. at 701. See also West v. Atkins, 487 U.S. 42, 28-50 (1988) ("The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"); District of Columbia v. Carter, 409 U.S. 419, 424-25 (1973); Kite v. Kelley, 546 F.2d 334 (10th

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[7/] In his Objection to the Motion to Dismiss, Plaintiff also referenced *"Bivens"* as providing jurisdiction for Plaintiff's Section 1983 claim. Although Plaintiff does not elaborate, the Court presumed Plaintiff is referring to Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). In Bivens, the Court permitted a cause of action against federal narcotics agents for alleged violations of an individual's Fourth Amendment rights. Plaintiff's complaint does not allege a Bivens cause of action, and Bivens cannot be interpreted as providing jurisdiction for a Section 1983 claim.

Cir. 1976) ("Section 1983 has no application to federal officers acting pursuant to federal law.").

Plaintiff's first and second claims for relief assert causes of actions premised on Section 1983. The District Court has dismissed all actions against Defendants with the exception of Plaintiff's causes of action against the United States of America. Because Plaintiff cannot properly assert a Section 1983 claim against Defendant for alleged violations under "color of federal law," Plaintiff's first and second claims should be dismissed with prejudice.

III. TORT CLAIMS (Claim No. 3)

Plaintiff's third claim for relief alleges "negligent if not intentional actions or omissions in tort of Defendants." Plaintiff additionally asserts in his reply that he is entitled to punitive damages.

Although Plaintiff initially alleged claims against numerous Defendants, the only remaining Defendant is the United States. Under the Federal Tort Claims Act ("FTCA") the United States has waived its sovereign immunity from tort claims. The FTCA provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674. However, prior to bringing an action a Plaintiff must comply with certain prerequisites.

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C. § 2675(a) (emphasis added).

This provision is strictly construed and is a jurisdictional prerequisite to the filing of a tort action against the United States in federal court. See Lurch v. United States, 719 F.2d 333, 335 n.3 (10th Cir. 1983). See also Cizek v. United States, 953 F.2d 1232 (10th Cir. 1992) ("Because the FTCA constitutes a waiver of the government's sovereign immunity, the notice requirements established by the FTCA must be strictly construed."). Furthermore, the filing of a lawsuit cannot replace the FTCA notice requirements. Id. at 1234.

For this Court to have jurisdiction over Plaintiff's claims, Plaintiff must allege in his complaint that his "tort" claims have been presented to the appropriate federal agency, and Plaintiff must allege the final disposition of those claims by that agency. Altman v. Connally, 456 F.2d 1114 (2d Cir. 1972) ("Insofar as the complaint seeks recovery from the United States in tort, it was also deficient in that, apart from other considerations, it failed to allege the presentation of the claim to the appropriate federal agency and a final disposition of the claim by that agency, as required by 28 U.S.C. § 2675."); Lann v. Hill, 436 F. Supp. 463 (W.D. Okla. 1977) ("The filing of a claim with the appropriate Federal agency and the disposition of the claim by that

agency is a jurisdictional requirement to bringing a Federal tort claims action in this Court and such prerequisite cannot be waived. An action instituted in a Federal district court under the Federal Tort Claims Act must be dismissed where the Plaintiffs have not first filed an administrative claim as required by 28 U.S.C. § 2675(a)."). Plaintiff has failed to comply with the jurisdictional prerequisites of 28 U.S.C. § 2671 *et seq.* The Court recommends that Plaintiff's third cause of action be dismissed without prejudice.

IV. CONTRACT CLAIM (Claim No. 4)

Plaintiff's fourth claim for relief asserts that various Defendants infringed on Plaintiff's contractual rights. Plaintiff does not assert this cause of action against the United States of America. Because the District Court has dismissed all other Defendants, Plaintiff's contract action, which has not been asserted against the United States, should be dismissed.

V. MOSAIC LAW OF COMMON DECENCY (Claim No. 5)

Plaintiff's final cause of action alleges that "certain basic wrongs may not be included in American jurisprudence but should be lest we allow conspirators with expertise in American jurisprudence [to] circumvent morality . . . . and [Defendant] has broken one or both of the Mosaic Laws bearing false witness and failure to prosecute."[8/] Plaintiff refers the Court to no specific codification of Mosaic law. If

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[8/] Webster's Third New International Dictionary (1993), defines Mosaic law as "the ancient Hebrew moral and ceremonial law attributed to Moses."

he intends the ten prescriptions engraved on stone by "the finger of God"[9/] and brought down by Moses from Mount Sinai, Plaintiff cannot establish jurisdiction in the Northern District of Oklahoma. The respective authorities behind the Ten Commandments and the federal jurisdictional statutes have agreed that neither will try to enforce the laws of the other.[10/] Plaintiff petitions the wrong sovereign for redress.

Regardless, Plaintiff has failed to assert a recognizable cause of action under American civil law. To the extent Plaintiff is attempting to assert a cause of action based on tort, Plaintiff must comply with the FTCA. To the extent Plaintiff is attempting to allege a common law cause of action, Plaintiff must allege sufficient facts for the Court to identify the cause of action and Plaintiff must allege how the Court has jurisdiction. Because the Court is unable to determine what "cause of action" Plaintiff is asserting, even if Plaintiff's complaint is liberally construed, the Court recommends that Plaintiff's fifth cause of action be dismissed.

VI. RECOMMENDATION

The United States Magistrate Judge recommends that the District Court **GRANT** Defendant's Motions to Dismiss [Doc. No. 32-1]. With respect to Plaintiff's first and second causes of action, the dismissal should be with prejudice.

[9/] *Exodus* 31:18 (New American Standard).

[10/] See, e.g., *Matthew 22:21* (on rendering unto Caesar); U.S. CONST. Amend. I (Congress shall make no law respecting an establishment of religion.).

Any objection to this Report and Recommendation **must be filed with the Clerk of the Courts within ten days** of the receipt of this notice. **Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's order.** See Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 15 day of March 1996.

Sam A. Joyner
United States Magistrate Judge

3-19-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. CLYDE C. PATRICK, JR.; VICKI S. PATRICK; CITY OF GLENPOOL, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	FILED MAR 18 1996 Richard M. Lawrence, Court Clerk U.S. DISTRICT COURT Civil Case No. 95-C 1043H

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of March 18, 1996 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendants, **CLYDE C. PATRICK JR., VICKI S. PATRICK, and CITY OF GLENPOOL, Oklahoma**, against whom judgment for affirmative relief is sought in this action have failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, RICHARD M. LAWRENCE, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendants.

Dated at Tulsa, Oklahoma, this 18 day of March 1996.

RICHARD M. LAWRENCE, Clerk
United States District Court for
the Northern District of Oklahoma

By L. Adamski
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 18 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

HARMON E. WELSH,

Plaintiff,

vs.

CITY OF TULSA, OKLAHOMA, a municipal corporation; and THOMAS L. BAKER,

Defendants.

93-C-405-E

RECEIVED

ENTERED ON DOCKET
DATE MAR 19 1996

STIPULATION OF DISMISSAL

COME NOW plaintiff Harmon E. Welsh and defendants City of Tulsa and Thomas L. Baker and stipulate to dismissal without prejudice of the captioned case pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii).

CITY OF TULSA, OKLAHOMA,
a municipal corporation,
DAVID L. PAULING,
City Attorney

By Ellen Hinchee
Ellen R. Hinchee, OBA # 12339
Attorney for City of Tulsa and Thomas L. Baker
Assistant City Attorney
200 Civic Center, Room 316
Tulsa, Oklahoma 74103
(918) 596-7717

HARMON E. WELSH

By
D. Gregory Bledsoe, OBA #874
Attorney for Plaintiff
1717 South Cheyenne Avenue
Tulsa, Oklahoma 74119-4664
(918) 599-8123

FILED

MAR 15 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO. 95-C-1232-K**
	)	
OKLAHOMA CENTRAL CREDIT UNION CERTIFICATES OF DEPOSIT OF ROBERT M. VILLAGOMEZ, NOS. 485540-6, 485540-7, AND 485540-8,	)	
	)	
Defendants.	)	

ENTERED ON DOCKET

DATE MAR 18 1996

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture against the defendant properties, and all entities and/or persons interested in the defendant properties, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 19th day of December 1995, alleging that the defendant properties, to-wit:

a) **Oklahoma Central Credit Union Certificate of Deposit of Robert M. Villagomez No. 485540-6 in the amount of $4,237.59;**

b) **Oklahoma Central Credit Union Certificate of Deposit of Robert M. Villagomez No. 485540-7 in the amount of $22,189.16;**

MAILED

c) **Oklahoma Central Credit Union Certificate of Deposit of Robert M. Villagomez No. 485540-8 in the amount of $1,868.36;**

d) **The Sum of Sixteen Thousand Two Hundred Ninety-Two and 55/100 Dollars ($16,292.55) in Account No. 9109322363 at Bank of Oklahoma in the Name of Robert Villagomez or Carmen Villagomez,**

are subject to forfeiture pursuant to 18 U.S.C. § 981, 18 U.S.C. § 1956, and 18 U.S.C. § 1343 because they represent proceeds of the theft of government property, which were involved in a transaction in violation of 18 U.S.C. § 1956, or property traceable to such property, and/or is property derived from proceeds in violation of 18 U.S.C. § 1343, wire fraud.

Warrant of Arrest and Notice In Rem as to the defendant properties was issued by the Clerk of this Court on December 22, 1995, providing that the United States Marshal for the Northern District of Oklahoma arrest, seize, and detain the defendant properties in his possession until the further order of this Court. The Warrant further provided that the United States Marshals Service publish Notice of Arrest and Seizure in the Northern District of Oklahoma, according to law.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of arrest and Notice In Rem on the defendant properties as follows:

Oklahoma Central Credit Union CD No. 485540-6 in the name of Robert M. Villagomez At: Oklahoma Central Credit Union 11335 East 41st Street Tulsa, Oklahoma 74146	**Served: January 5, 1996**
Oklahoma Central Credit Union CD No. 485540-7 in the name of Robert M. Villagomez At: Oklahoma Central Credit Union 11335 East 41st Street Tulsa, Oklahoma 74146	**Served: January 5, 1996**
Oklahoma Central Credit Union CD No. 485540-8 in the name of Robert M. Villagomez At: Oklahoma Central Credit Union 11335 East 41st Street Tulsa, Oklahoma 74146	**Served: January 5, 1996**
$16,292.55 in Account No. 910932363 in the name of Robert M. Villagomez or Carmen Villagomez at Bank of Oklahoma, Tulsa, Oklahoma.	**Served: January 5, 1996**

Robert M. Villagomez, the only known potential claimant with standing to file a claim against the defendant properties, executed Stipulations for Forfeiture of the defendant properties on July 17, 1995, and October 25, 1995, relinquishing all right,

title, or interest he might have in and to the defendant properties.

USMS 285s reflecting the service upon the defendant properties are on file herein.

All persons or entities interested in the defendant properties were required to file their claims herein within ten (10) days after service upon them of the Warrants of Arrest and Notices In Rem, publication of the Notices of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

There were no claims or answers filed by any individual or entity as to the defendant properties.

Publication of Notice of Arrest and Seizure occurred in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, the district in which this action is filed, on January 25 and February 1 and 8, 1996.

No claims in respect to the defendant properties have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant properties, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant properties and all persons and/or entities interested therein, except Robert M. Villagomez, whose

interest, if any, in the defendant properties was relinquished by virtue of the Stipulations for Forfeiture he executed July 17, 1995, and October 25, 1995.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that judgment of forfeiture be entered against the following-described defendant properties:

Oklahoma Central Credit Union CD No. 485540-6 in the name of Robert M. Villagomez

Oklahoma Central Credit Union CD No. 485540-7 in the name of Robert M. Villagomez

Oklahoma Central Credit Union CD No. 485540-8 in the name of Robert M. Villagomez

$16,292.55 in Account No. 910932363 in the name of Robert M. Villagomez or Carmen Villagomez at Bank of Oklahoma, Tulsa, Oklahoma,

and that the defendant properties be, and they hereby are, forfeited to the United States of America for disposition according to law, in the following priority:

a) First, payment to the United States of America for all expenses of forfeiture of the defendant properties.

b) Second, payment to the Office of the Inspector General, United States

Railroad Retirement Board, 515 North Belt East, Suite 460-A, Houston, Texas 77060, the victim of the illegal acts of Robert M. Villagomez, of the remaining proceeds.

s/ TERRY C. KERN

TERRY C. KERN, Judge of the
United States District Court

SUBMITTED BY:

CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\CHOOK\FC\VGOMEZ1\05254

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE MAR 16 1996

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES A. HAYNES; GLORIA JEAN HAYNES; BLAZER FINANCIAL SERVICES; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED
MAR 15 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 95 C 930K

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that the Entry of Default By Court Clerk filed on the 6th day of February, 1996 and the Judgment of Foreclosure entered herein on the 8th day of February, 1996, are vacated, and the action be dismissed without prejudice.

Dated this 15 day of March, 1996.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE MAILED BY COUNSEL AND IMMEDIATELY

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	ENTERED ON DOCKET
Plaintiff,	)	DATE MAR 19 1996
	)	
vs.	)	
	)	FILED
JAMES A. HAYNES; GLORIA JEAN HAYNES; BLAZER FINANCIAL SERVICES; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	MAR 15 1996
	)	Richard M. Lawrence, Court Clerk
	)	U.S. DISTRICT COURT
Defendants.	)	Civil Case No. 95 C 930K

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that the Entry of Default By Court Clerk filed on the 6th day of February, 1996 and the Judgment of Foreclosure entered herein on the 8th day of February, 1996, are vacated, and the action be dismissed without prejudice.

Dated this 15 day of March, 1996.

/s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE MAILED BY COUNSEL AND IMMEDIATELY

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. JAMES A. HAYNES; GLORIA JEAN HAYNES; BLAZER FINANCIAL SERVICES; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	FILED FEB 20 1996 Richard M. Lawrence, Court Clerk U.S. DISTRICT COURT Civil Case No. 95 C 930K

MOTION OF THE UNITED STATES OF AMERICA TO VACATE ENTRY OF DEFAULT BY COURT CLERK AND TO VACATE JUDGMENT OF FORECLOSURE AND TO DISMISS WITHOUT PREJUDICE

The Plaintiff, United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, hereby requests the Court to vacate the Entry of Default by Court Clerk filed in this case on the 6th day of February, 1996 and the Judgment of Foreclosure entered in this case on the 8th day of February, 1996, and to dismiss without prejudice.

In support of this Motion the Plaintiff shows to the Court that Plaintiff has discovered that the Department of Housing and Urban Development sold the mortgage of the property to Commercial Financial Services.

Counsel for answering Defendants have been contacted and have no objections to the granting of this Motion.

UNITED STATES OF AMERICA

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 14th day of February, 1996, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to:

JAMES A. HAYNES
1020 North Delaware Pl
Tulsa, OK 74110

GLORIA JEAN HAYNES
1020 North Delaware Pl
Tulsa, OK 74110

BLAZER FINANCIAL SERVICES
5146 S. Peoria Ave
Tulsa, OK 74105

DICK A. BLAKELEY, OBA #852
Assistant District Attorney
Tulsa County, Oklahoma
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103

Assistant United States Attorney

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE MAR 18 1996

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NABIL NOFAL aka NABIL A. NOFAL; WAFA NOFAL; CITICORP PERSON TO PERSON FINANCIAL CENTER, INC.; BLACKSTOCK, JOYCE, POLLARD & MONTGOMERY;COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED
MAR 15 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 95-C 227K

ORDER CONFIRMING SALE

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed February 21, 1996, in which the Magistrate Judge recommended that the Motion to Confirm Sale be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and is affirmed.

It is therefore **ORDERED** that the Motion to Confirm Sale is granted.

Dated this 15 day of March, 1996.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE MAILED BY ATTORNEY OF RECORD TO PRO SE PARTIES IMMEDIATELY UPON RECEIPT.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
MAR 18 1996

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEE OWENS aka CLIFFORD LEE OWENS; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED
MAR 15 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 95-C 80K

ORDER CONFIRMING SALE

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed February 21, 1996, in which the Magistrate Judge recommended that the Motion to Confirm Sale be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and is affirmed.

It is therefore **ORDERED** that the Motion to Confirm Sale is granted.

Dated this 15 day of March, 1996.

s/ TERRY C. KERN
UNITED STATES DISTRICT JUDGE

NOTE: [illegible] BY MAIL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE MAR 16 1996

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	FILED
	)	
ANNA MAE HOGARD aka Ann Mulvehill; QUAD STATES FINANCIAL SERVICES; COUNTY TREASURER, Ottawa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Ottawa County, Oklahoma,	)	MAR 15 1996 Richard M. Lawrence, Clerk of District Court
	)	
Defendants.	)	Civil Case No. 95 C 1175K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15 day of March, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Ottawa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Ottawa County, Oklahoma, and ANNA MAE HOGARD aka Ann Mulvehill Hogard, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, ANNA MAE HOGARD aka Ann Mulvehill Hogard, was served a copy of Summons and Complaint on January 24, 1996, by Certified Mail; that Defendant, COUNTY TREASURER, Ottawa County, Oklahoma, was served a copy of Summons and Complaint on November 30, 1995, by Certified Mail; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Ottawa County, Oklahoma, was served a copy of Summons and Complaint on November 30, 1995, by Certified Mail.

NOTE: THIS ORDER IS TO BE MAILED BY THE PLAINTIFF'S COUNSEL AND FAXED TO ALL PARTICIPANTS IMMEDIATELY UPON RECEIPT.

It appears that the Defendants, ANNA MAE HOGARD aka Ann Mulvehill Hogard, COUNTY TREASURER, Ottawa County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Ottawa County, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, ANNA MAE HOGARD, is one and the same person as Anna Mulvehill Hogard, and is a single unmarried person.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Ottawa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Five (5), Block Six (6), NANCY LEE ADDITION to the City of Miami, Ottawa County, State of Oklahoma, according to the amended plat thereof.

The Court further finds that on December 18, 1978, Kenneth L. Key and Sharon Kay Key, executed and delivered to MODERN AMERICAN MORTGAGE CORPORATION, their mortgage note in the amount of $16,950.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Kenneth L. Key and Sharon Kay Key, husband and wife, executed and delivered to MODERN AMERICAN MORTGAGE CORPORATION, a mortgage dated December 18, 1978, covering the above-described property. Said mortgage was recorded on December 27, 1978, in Book 385, Page 665, in the records of Ottawa County, Oklahoma.

The Court further finds that on July 16, 1980, Modern American Mortgage Corp., assigned the above-described mortgage note and mortgage to the SECRETARY OF

HOUSING AND URBAN DEVELOPMENT of Washington, DC, his successors and assigns. This Assignment of Mortgage was recorded on July 28, 1980, in Book 400, Page 525, in the records of Ottawa County, Oklahoma.

The Court further finds that on April 3, 1990, Secretary of Housing and Urban Development, assigned the above-described mortgage not and mortgage to Associates Service Corporation. This Assignment of Mortgage was recorded on September 14, 1990, in Book 486, Page 274, in the records of Ottawa County, Oklahoma.

The Court further finds that on July 9, 1991, Associates Service Corporation, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on July 30, 1991, in Book 505, Page 223, in the records of Ottawa County, Oklahoma. A second Assignment of Mortgage was recorded on March 9, 1992, in Book 523, Page 13, in the records of Ottawa County, Oklahoma.

The Court further finds that Defendant, ANNA MAE HOGARD, currently holds title to the property by virtue of a General Warranty Deed, dated January 24, 1983, and recorded on January 24, 1983, in Book 419, Page 829, in the records of Ottawa County, Oklahoma, and is the current assumptor of the subject indebtedness.

The Court further finds that on April 1, 1985, the Defendant, ANNA MAE HOGARD, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on October 1, 1991.

The Court further finds that the Defendant, ANNA MAE HOGARD, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, ANNA MAE HOGARD, is indebted to the Plaintiff in the principal sum of $24,607.69, plus interest at the rate of 9.5 percent per annum from March 23, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, ANNA MAE HOGARD, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Ottawa County, Oklahoma, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, ANNA MAE HOGARD, in the principal sum of $24,607.69, plus interest at the rate of 9.5 percent per annum from March 23, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, ANNA MAE HOGARD, COUNTY TREASURER and BOARD OF COUNTY

COMMISSIONERS, Ottawa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, ANNA MAE HOGARD, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and

decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11168
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 95 C 1175K

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONNIE J. ARELLANO; MANUEL TORRES ARELLANO; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET
MAR 18 1996

FILED
MAR 15 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 95 C 932K

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that the Entry of Default By Court Clerk filed on the 6th day of February, 1996 and the Judgment of Foreclosure entered herein on the 8th day of February, 1996, are vacated, that the case be dismissed without prejudice..

Dated this 15 day of March, 1996.

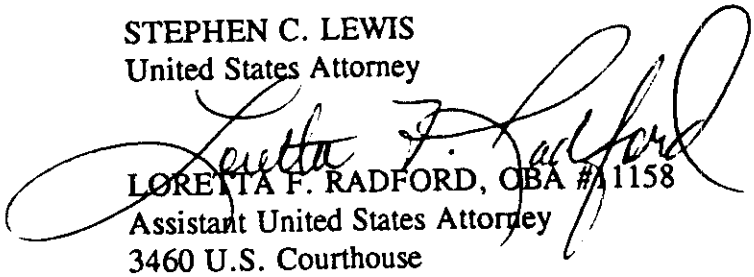
s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

MAILED
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, OK 74103
(918) 581-7463

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN HOME ASSURANCE COMPANY,	)	
Plaintiff,	)	
vs.	)	**Case No. 95-C-766-BU**
FRANCIS TAYLOR AND NORMA TAYLOR,	)	
Defendants,	)	
vs.	)	
CHEVALLEY MOVING & STORAGE COMPANY OF DEWEY, INC.,	)	
Third Party Defendant.	)	

MAR 18 1996

MAR 15 1996

Phil Lombardi, Clerk

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, Plaintiff, American Home Assurance Company and the Defendants, Francis and Norma Taylor, hereby stipulate with each other and the Third Party Defendant, Chevalley Moving & Storage Company of Dewey, Inc. and the putative intervenor, State Farm Fire & Casualty Company, that this action shall be dismissed with prejudice. Each party is to bear its own costs and attorney fees.

Rita Gassaway, Attorney for Plaintiff
American Home Assurance Company

James Dunham, Attorney for Defendants
Francis and Norma Taylor

Jacqueline Haglund, Attorney for
Third-Party Defendant Chevalley Moving &
Storage Company of Dewey, Inc.

for Paul Harmon

Paul Harmon, Attorney for State Farm
Fire & Casualty Company

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 15 1996
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL ANDREWS,

PLAINTIFF,

vs.

TOWN OF SKIATOOK, OKLAHOMA,

DEFENDANT.

CASE NO. 95-C-0057-M

EOD 3/18/96

JUDGMENT

Judgment is hereby entered for the Defendant, Town of Skiatook, Oklahoma and against Plaintiff, Michael Andrews.

DATED this 15th day of March, 1996.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

10

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

H.D. HULETT,

Plaintiff,

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

FILED
MAR 15 1996
Richard M. [illegible], Clerk
U.S. DISTRICT COURT

Case No. 92-C-136-W

ENTERED ON DOCKET
MAR 18 1996

ORDER AND JUDGMENT

As per the Order and Judgment of the Tenth Circuit Court of Appeals attached hereto as Exhibit A, the decision of the Secretary was affirmed as to termination of benefits and recovery of payments made to plaintiff from April 1984 through August of 1986 and reversed as to eligibility for benefits and recovery of payments made prior to April 1984.

The case is remanded to the Secretary for further proceedings not inconsistent with the Tenth Circuit Court of Appeals' Order and Judgment.

Dated this 14th day of March, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:hulett

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

JAN 10 1996

PATRICK FISHER
Clerk

H.D. HULETT, Plaintiff-Appellant, v. SHIRLEY S. CHATER, Commissioner of Social Security,* Defendant-Appellee.	No. 95-5015 (D.C. No. 92-C-136-W) (N.D. Okla.)

ORDER AND JUDGMENT**

Before SEYMOUR, Chief Judge, McKAY, and EBEL, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P.

* Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. App. P. 43(c), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the defendant in this action. Although we have substituted the Commissioner for the Secretary in the caption, in the text we continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

** This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff appeals from the district court's decision affirming the Secretary's termination of disability benefits. This court will review the Secretary's decision to insure that the findings of fact are supported by substantial evidence and that the Secretary applied the law correctly. See Kelley v. Chater, 62 F.3d 335, 337 (10th Cir. 1995). Upon consideration of the record and the parties' appellate arguments, we affirm the Secretary's recovery of payments "commencing in April 1984 and continuing through August 1986," see II Appellant's App. at 13. We reverse and remand this cause to the extent that the Secretary's decision allows recovery for any payments made prior to April 1984.

The Secretary determined that plaintiff was entitled to receive disability benefits as a result of a heart attack he suffered in June 1979. In 1982, however, in light of plaintiff's reported earnings of $22,900 for 1979, $5,773 for 1980, and $20,685 for 1981, the Secretary inquired whether plaintiff was engaged in substantial gainful activity, which would make him ineligible to receive disability benefits, 20 C.F.R. § 404.1520(b); Fowler v. Bowen, 876 F.2d 1451, 1453 (10th Cir. 1989). After an investigation, the Secretary decided to continue plaintiff's disability benefits, determining that plaintiff was not engaged in substantial gainful activity, despite these reported earnings.

In 1983, the Secretary again made a determination to continue benefits, following a medical review. At that time, the Secretary

noted that "[s]ince work activity hasn't changed since [substantial gainful activity] determination was made no additional development is needed concerning work activity." II Appellant's App. at 140.

In June 1986, however, the Secretary terminated plaintiff's disability benefits, in light of his performance of substantial gainful activity as president of Aztec Energy, Inc., and through his real estate affiliations. In doing so, the Secretary reopened the original disability determination and concluded that plaintiff's application for benefits involved "fraud or similar fault" because plaintiff had actually never been disabled. Id. at 13. "[N]either the claimant nor any of his witnesses have established a credible explanation for the claimant's substantial earnings of 1979 and 1980 which would preclude the existence of substantial gainful activity during said periods of time." Id. at 15. The Secretary, therefore, determined that "the entirety of the disability insurance benefits which the claimant has collected were obtained by fraud and constitute overpayment." Id. at 16. The district court affirmed.

Plaintiff argues that the Secretary erred in reopening the initial disability determination. In order to reopen that decision, eleven years later, the Secretary had to first determine that that initial determination was the product of "fraud or similar fault." See 20 C.F.R. § 404.988(c)(1). The Secretary did determine that plaintiff "initially establish[ed] his right [to] disability insurance benefits through fraud," II Appellant's App. at 16, in light of his reported earnings for the years 1979 and

1980, id. at 15. Plaintiff argues, however, that the Secretary's 1982 and 1983 decisions to continue benefits preclude the Secretary from reopening the original disability determination. We agree.

"The regulations promulgated under the Social Security Act establish a scheme for ensuring finality in the Secretary's determinations. 20 C.F.R. §§ 404.905, 404.987-404.989. It is by now well established that these regulations embody fundamental and familiar principles of res judicata." Dugan v. Sullivan, 957 F.2d 1384, 1387 (7th Cir. 1992). A decision to continue disability benefits is an "initial determination," 20 C.F.R. § 404.902(a), which in turn is a "determination," 20 C.F.R. § 404.901, subject to the administrative res judicata provisions of 20 C.F.R. §§ 404.987-404.989. See Dugan, 957 F.2d at 1387-88; Draper v. Sullivan, 899 F.2d 1127, 1130 (11th Cir. 1990).

The Secretary's 1982 and 1983 decisions to continue disability benefits were made following an investigation of these same reported earnings for 1979 and 1980, as well as those for 1981, based upon the Secretary's determination that those reported earnings were not the result of substantial gainful activity. The Secretary does not allege the existence of any new indices of fraud that she currently possesses that were unavailable when the Secretary made these continuation determinations. Significantly, the Secretary has never sought to reopen the 1982 or 1983 decisions to continue benefits. See Lauer v. Bowen, 818 F.2d 636 (7th Cir. 1987)(Secretary could not ignore previous ruling that claimant's work was not substantial gainful activity). The 1982

and 1983 continuation-of-benefits determinations, therefore, preclude the Secretary from reopening the initial disability determination, based upon those same reported earnings. See Dugan, 957 F.2d at 1387-88, 1391; Draper, 899 F.2d at 1130.

The Secretary further determined, however, that plaintiff had engaged in substantial gainful activity, see 20 C.F.R. § 1575(a), beginning in 1984. After reviewing the record and considering the parties' appellate arguments, we conclude that the record does contain substantial evidence to support this finding of fact.

To the extent that the Secretary's decision allows recovery for all disability benefits paid, therefore, we reverse the district court's affirmance of that determination. We, however, affirm the district court's decision upholding the Secretary's determination to the extent it authorizes recovery of payments made "commencing in April 1984 and continuing through August 1986," II Appellant's App. at 13.

The judgment of the United States District Court for the Northern District of Oklahoma is, therefore, AFFIRMED in part, REVERSED in part, and REMANDED to the district court with instructions to remand to the Secretary for further proceedings not inconsistent with this order and judgment.

Entered for the Court

David M. Ebel
Circuit Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. OLUSEGUN ADEDAYO ADETULA aka Olusegun A. Adetula; BRENDA GAIL ADETULA; BANK OF OKLAHOMA, N.A.; CHARLES F. CURRY COMPANY; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	ENTERED ON DOCKET DATE MAR 18 1996 FILED MAR 15 1996 Richard M. Lawrence, Court Clerk District Court Civil Case No. 95 C 581K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15 day of March, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, BANK OF OKLAHOMA N.A., appears by its Attorney, E.J. Raymond; the Defendant, OLUSEGUN ADEDAYO ADETULA aka Olusegun A. Adetula, appears not; the Defendant, CHARLES F. CURRY COMPANY, appears not and should be dismiss from this action having previously filed a Corrected Assignment of Mortgage; and the Defendant, BRENDA GAIL ADETULA, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, OLUSEGUN ADEDAYO ADETULA aka Olusegun A. Adetula, was served with process a copy of Summons and Complaint on August 16, 1995; that the Defendant, BANK OF OKLAHOMA, N.A., signed a Waiver of Summons on July 5, 1995.

The Court further finds that the Defendant, CHARLES F. CURRY COMPANY, filed a Corrected Mortgage Assignment on July 20, 1995, in Book 5729, Page 2162, in the records of Tulsa County, Oklahoma, and should therefore be dimissed as a Defendant herein.

The Court further finds that the Defendant, BRENDA GAIL ADETULA, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning November 3, 1995, and continuing through December 8, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, BRENDA GAIL ADETULA, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, BRENDA GAIL ADETULA. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United

States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on July 11, 1995; that the Defendant, BANK OF OKLAHOMA, N.A., filed its Answer on July 5, 1995; that the Defendant, OLUSEGUN ADEDAYO ADETULA aka Olusegun A. Adetula, filed a response on August 18, 1995; and that the Defendant, BRENDA GAIL ADETULA, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, OLUSEGUN ADEDAYO ADETULA, is one and the same person as Olusegun A. Adetula, and will hereinafter be referred to as "OLUSEGUN ADEDAYO ADETULA."

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Fourteen (14), Block Fifty-six (56), VALLEY VIEW THIRD ADDITION to the City of Tulsa, Tulsa County,

State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on April 19, 1982, the Defendant, OLUSEGUN ADEDAYO ADETULA, executed and delivered to CHARLES F. CURRY COMPANY, a mortgage note in the amount of $24,900.00, payable in monthly installments, with interest thereon at the rate of Fifteen and One-Half percent (15½%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, OLUSEGUN ADEDAYO ADETULA, a single person, executed and delivered to CHARLES F. CURRY COMPANY a mortgage dated April 19, 1982, covering the above-described property. Said mortgage was recorded on April 21, 1982, in Book 4608, Page 648, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 11, 1989, CHARLES F. CURRY COMPANY, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on September 15, 1989, in Book 5207, Page 2281, in the records of Tulsa County, Oklahoma. A Corrected Assignment of Mortgage was recorded on July 20, 1995, in Book 5729, Page 2162, in the records of Tulsa County, Oklahoma, to correct the signature line.

The Court further finds that on October 1, 1989, the Defendant, OLUSEGUN ADEDAYO ADETULA, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on August 1, 1990, August 1, 1991, February 1, 1992 and August 1, 1992.

The Court further finds that the Defendant, OLUSEGUN ADEDAYO ADETULA, made default under the terms of the aforesaid note and mortgage, as well as the

terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, OLUSEGUN ADEDAYO ADETULA, is indebted to the Plaintiff in the principal sum of $44,097.87, plus interest at the rate of 15½ percent per annum from March 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $2.00, plus penalties and interest, which became a line on the property as of June 25, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, BANK OF OKLAHOMA, N.A., has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of $1,197.60 which became a lien on the property as of June 19, 1991. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, BRENDA GAIL ADETULA, is in default, and has no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, OLUSEGUN ADEDAYO ADETULA, in the principal sum of $44,097.87, plus interest at the rate of 15½ percent per annum from March 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $2.00, plus costs and interest, for personal property taxes for the year 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, BANK OF OKLAHOMA, N.A., have and recover judgment in the amount of $1,197.60 for its judgment, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, OLUSEGUN ADEDAYO ADETULA, BRENDA GAIL ADETULA, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property, and the Defendant, CHARLES F. CURRY COMPANY, is hereby dismissed as a Defendant herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, OLUSEGUN ADEDAYO ADETULA, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal

for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, BANK OF OKLAHOMA, N.A., in the amount of $1,197.60, for its judgment.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $2.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right

to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

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United States Attorney

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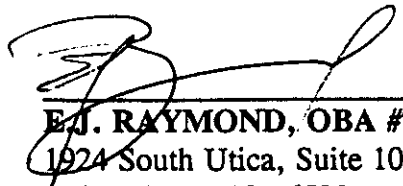
Tulsa County, Oklahoma



E.J. RAYMOND, OBA #7442
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(918) 749-7378
Attorney for Defendant,
Bank of Oklahoma, N.A.

Judgment of Foreclosure
Civil Action No. 95-C 581K

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. GLORIA EPPERSON; CATHY LESTER; UNKNOWN SPOUSE OF Gloria Epperson, if any; UNKNOWN SPOUSE OF Cathy Lester, if any; THE NEW YORK GUARDIAN MORTGAGEE CORPORATION; COUNTY TREASURER, Rogers County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, Defendants.	)	FILED MAR 15 1996 Richard M. Lawrence, Court Clerk U.S. DISTRICT COURT Civil Case No. 95-C 281K ENTERED ON DOCKET DATE MAR 18 1996

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15 day of March, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, appear by Michele L. Schultz, Assistant District Attorney, Rogers County, Oklahoma; and the Defendants, GLORIA EPPERSON, CATHY LESTER, UNKNOWN SPOUSE OF Gloria Epperson, if any, UNKNOWN SPOUSE OF Cathy Lester, if any and THE NEW YORK GUARDIAN MORTGAGEE CORPORATION, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, GLORIA EPPERSON, was served copy of Summons and Complaint on May 26,

1995, by Certified Mail; that the Defendant, CATHY LESTER, was served a copy of Summons and Complaint on July 6, 1995, by Certified Mail; that the Defendant, THE NEW YORK GUARDIAN MORTGAGEE CORPORATION, signed a Waiver of Summons on April 21, 1995; that Defendant, COUNTY TREASURER, Rogers County, Oklahoma, was served a copy of Summons and Complaint on March 31, 1995, by Certified Mail; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, was served a copy Summons and Complaint on March 31, 1995, by Certified Mail.

The Court further finds that the Defendants, UNKNOWN SPOUSE OF Gloria Epperson, if any and UNKNOWN SPOUSE OF Cathy Lester, if any, were served by publishing notice of this action in the Claremore Daily Progress, a newspaper of general circulation in Rogers County, Oklahoma, once a week for six (6) consecutive weeks beginning August 3, 1995, and continuing through September 7, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, UNKNOWN SPOUSE OF Gloria Epperson, if any and UNKNOWN SPOUSE OF Cathy Lester, if any, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, UNKNOWN SPOUSE OF Gloria Epperson, if any and UNKNOWN SPOUSE OF Cathy Lester, if any. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law

and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, filed their Answer on April 5, 1995; and that the Defendants, GLORIA EPPERSON, CATHY LESTER, UNKNOWN SPOUSE OF Gloria Epperson, if any, UNKNOWN SPOUSE OF Cathy Lester, if any and THE NEW YORK GUARDIAN MORTGAGEE CORPORATION, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT 14 IN BLOCK 3 OF FALLETTI ADDITION TO THE CITY OF CLAREMORE, ROGERS COUNTY, OKLAHOMA, ACCORDING TO THE SECOND AMENDED PLAT THEREOF.

The Court further finds that on January 27, 1984, James R. Stephens and Judy G. Stephens, executed and delivered to UNITED BANKERS MORTGAGE CORPORATION, their mortgage note in the amount of $46,724.00, payable in monthly installments, with interest thereon at the rate of Twelve and One-Half percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, James R. Stephens and Judy G. Stephens, husband and wife, executed and delivered to UNITED BANKERS MORTGAGE CORPORATION, a mortgage dated January 27, 1984, covering the above-described property. Said mortgage was recorded on February 2, 1984, in Book 667, Page 658, in the records of Rogers County, Oklahoma.

The Court further finds that on April 30, 1985, UNITED BANKERS MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to FIRSTBANK MORTGAGE CO. This Assignment of Mortgage was recorded on May 13, 1985, in Book 703, Page 603, in the records of Rogers County, Oklahoma.

The Court further finds that on December 15, 1988, FIRSTBANK MORTGAGE CO., assigned the above-described mortgage note and mortgage to AMERICA'S MORTGAGE COMPANY. This Assignment of Mortgage was recorded on February 21, 1989, in Book 802, Page 486, in the records of Rogers County, Oklahoma. A Second Assignment was recorded on March 13, 1989, in Book 803, Page 636, in the records of Rogers County, Oklahoma. And a Corrected Assignment was recorded on October 12, 1993, in Book 931, Page 883, in the records of Rogers County, Oklahoma, to add the Vice President's signature.

The Court further finds that on January 26, 1989, AMERICA'S MORTGAGE COMPANY, assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT of Washington, D.C., his successor and assigns. This Assignment of Mortgage was recorded on March 13, 1989, in Book 803, Page 683, in the records of Rogers County, Oklahoma.

The Court further finds that Defendants, GLORIA EPPERSON and CATHY LESTER, currently hold the fee simple title to the property via mesne conveyances and are the current assumptors of the subject indebtedness.

The Court further finds that on January 6, 1989, the Defendants, GLORIA EPPERSON and CATHY LESTER, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on January 18, 1990.

The Court further finds that the Defendants, GLORIA EPPERSON and CATHY LESTER, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, GLORIA EPPERSON and CATHY LESTER, are indebted to the Plaintiff in the principal sum of $81,357.07, plus interest at the rate of 12.5 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Rogers County, Oklahoma, has a lien on the property which is the subject matter of this action by

virtue of personal property taxes in the amount of $28.32 which became a lien on the property as of 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, GLORIA EPPERSON, CATHY LESTER, UNKNOWN SPOUSE OF Gloria Epperson, if any, UNKNOWN SPOUSE OF Cathy Lester, if any and THE NEW YORK GUARDIAN MORTGAGEE CORPORATION, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, GLORIA EPPERSON and CATHY LESTER, in the principal sum of $81,357.07, plus interest at the rate of 12.5 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Rogers County, Oklahoma, have and recover judgment

in the amount of $28.32, plus costs and interest, for personal property taxes for the year 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, GLORIA EPPERSON, CATHY LESTER, UNKNOWN SPOUSE OF Gloria Epperson, if any, UNKNOWN SPOUSE OF Cathy Lester, if any, THE NEW YORK GUARDIAN MORTGAGEE CORPORATION and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, GLORIA EPPERSON and CATHY LESTER, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the Defendant, COUNTY TREASURER, Rogers County, Oklahoma, in the amount of $28.32, for personal taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

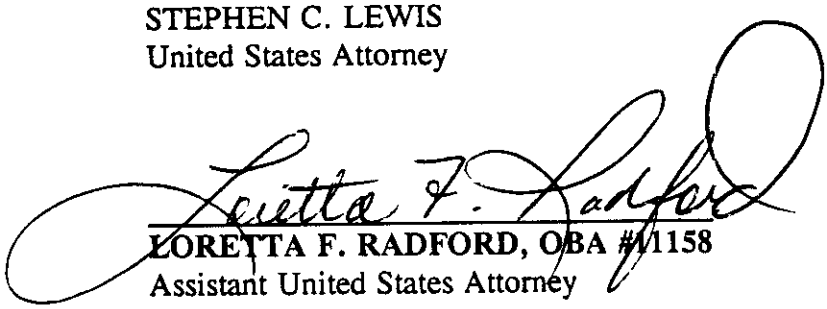
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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MICHELE L. SCHULTZ, OBA #13771
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County Treasurer and
Board of County Commissioners,
Rogers County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95 C 281K

LFR:flv

FILED

MAR 15 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SONDRA MULLINS,

Plaintiff,

v.

AMERADA HESS CORPORATION,

Defendant.

Case No. 94-C-1121K

ENTERED ON DOCKET
DATE 3-18-96

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant, by and through their respective attorneys, hereby jointly inform the Court that they have reached a mutually satisfactory private settlement regarding Plaintiff's claims herein, and all of Plaintiff's claims should, therefore, be dismissed with prejudice with each side to bear its own costs and attorneys' fees.

DATED this 14th day of March, 1996.

Respectfully submitted,

By: _____

Jeff Nix, Esq.
Leslie C. Rinn, Esq.
2121 South Columbia
Suite 710
Tulsa, Oklahoma 74114-3521

ATTORNEYS FOR PLAINTIFF

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

By: _____

J. Patrick Cremin, OBA #2013
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0594

ATTORNEYS FOR DEFENDANT

DKM-4253

ENTERED ON DOCKET
DATE 3-18-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DARREN OXFORD aka DARREN OXFORD; KIM SUE OXFORD; KELLY-MOORE PAINT CO., INC.; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,
Defendants.

FILED

MAR 15 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 96-C 124K

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 14 day of March 1996.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:
STEPHEN C. LEWIS
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 3-18-96

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS NED GIST aka Louis N. Gist aka Louis Gist; PEARL GIST; GILCREASE HILLS HOMEOWNER'S ASSOCIATION; COUNTY TREASURER, Osage County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma,

Defendants.

FILED
MAR 15 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 95 C 981K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15 day of March, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Osage County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, appear by John S. Boggs, Jr., Assistant District Attorney, Osage County, Oklahoma; and the Defendants, LOUIS NED GIST aka Louis N. Gist aka Louis Gist, PEARL GIST and GILCREASE HILLS HOMEOWNER'S ASSOCIATION, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, GILCREASE HILLS HOMEOWNER'S ASSOCIATION, was served a copy Summons and Complaint on November 10, 1995, by Certified Mail; that Defendant, COUNTY TREASURER, Osage County, Oklahoma, was served a copy of Summons and

Complaint on October 3, 1995, by Certified Mail; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, was served a copy of Summons and Complaint on October 3, 1995, by Certified Mail.

The Court further finds that the Defendants, LOUIS NED GIST aka Louis N. Gist aka Louis Gist and PEARL GIST, were served by publishing notice of this action in the Pawhuska Journal-Capital, a newspaper of general circulation in Osage County, Oklahoma, once a week for six (6) consecutive weeks beginning December 13, 1995, and continuing through January 17, 1996 as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, LOUIS NED GIST aka Louis N. Gist aka Louis Gist and PEARL GIST, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, LOUIS NED GIST aka Louis N. Gist aka Louis Gist and PEARL GIST. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by

publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Osage County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, filed their Answer on October 17, 1995; and that the Defendants, LOUIS NED GIST aka Louis N. Gist aka Louis Gist, PEARL GIST and GILCREASE HOMEOWNER'S ASSOCIATION, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, LOUIS NED GIST, is one and the same person as Louis N. Gist and Louis Gist, and will hereinafter be referred to as "LOUIS NED GIST." The Defendants, LOUIS NED GIST and PEARL GIST, were granted a Divorce on May 1, 1991, Case No. JFD-91-134, in Osage County, Oklahoma, The Defendants are both single unmarried persons.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Osage County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Eight (8), Block Nine (9), GILCREASE HILLS VILLAGE I, Blocks 7 thru 14, a Subdivision in Osage County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on July 24, 1989, the Defendant, LOUIS NED GIST, executed and delivered to CENTRAL MORTGAGE CORPORATION, his mortgage

note in the amount of $52,097.00, payable in monthly installments, with interest thereon at the rate of Eleven and One-Half percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, LOUIS NED GIST, a married person and PEARL GIST, his wife, executed and delivered to CENTRAL MORTGAGE CORPORATION a mortgage dated July 24, 1989, covering the above-described property. Said mortgage was recorded on July 31, 1989, in Book 758, Page 153, in the records of Osage County, Oklahoma.

The Court further finds that on July 24, 1989, CENTRAL MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to TRUST AMERICA MORTGAGE, INC. This Assignment of Mortgage was recorded on July 31, 1989, in Book 758, Page 158, in the records of Osage County, Oklahoma.

The Court further finds that on August 7, 1989, TRUST AMERICA MORTGAGE, INC., assigned the above-described mortgage note and mortgage to THE FLORIDA GROUP, INC. This Assignment of Mortgage was recorded on October 5, 1989, in Book 761, Page 397, in the records of Osage County, Oklahoma.

The Court further finds that on August 8, 1989, THE FLORIDA GROUP, INC., assigned the above-described mortgage note and mortgage to TARI, INC. F/KA TRUST AMERICA RESOURCES, INC. This Assignment of Mortgage was recorded on December 18, 1989, in Book 765, Page 237, in the records of Osage County, Oklahoma.

The Court further finds that on August 7, 1989, TARI, INC., assigned the above-described mortgage note and mortgage to GOVERNMENT NATIONAL MORTGAGE ASSOCIATION. This Assignment of Mortgage was recorded on March 8, 1990, in Book 769, Page 378, in the records of Osage County, Oklahoma.

The Court further finds that on February 26, 1990, GOVERNMENT NATIONAL MORTGAGE ASSOCIATION by: Midfirst Bank State Savings Bank, by its Attorney in fact, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on March 8, 1990, in Book 769, Page 379, in the records of Osage County, Oklahoma.

The Court further finds that on February 2, 1990, the Defendant, PEARL GIST, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreement was reached between these same parties on February 25, 1991, March 1, 1992 and January 29, 1993.

The Court further finds that the Defendants, LOUIS NED GIST and PEARL GIST, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, LOUIS NED GIST and PEARL GIST, are indebted to the Plaintiff in the principal sum of $82,939.13, plus interest at the rate of 11.5 percent per annum from February 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, LOUIS NED GIST, PEARL GIST and GILCREASE HILLS HOMEOWNER'S ASSOCIATION, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, LOUIS NED GIST and PEARL GIST, in the principal sum of $82,939.13, plus interest at the rate of 11.5 percent per annum from February 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, LOUIS NED GIST, PEARL GIST, GILCREASE HILLS HOMEOWNER'S ASSOCIATION, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, LOUIS NED GIST and PEARL GIST, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to

Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Osage County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95 C 981K

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 15 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

CATHY SULLINS,

Plaintiff,

v.

MARK HENSON, individually, and as an employee and representative of the United States Junior Chamber of Commerce; STEVEN LAWSON, individually, and as an employee and representative of the United States Junior Chamber of Commerce; GARY TOMPKINS, individually, and as an employee and representative of the United States Junior Chamber of Commerce; and the UNITED STATES JUNIOR CHAMBER OF COMMERCE, a Missouri Corporation,

Defendants.

Case No. 95-C-804-B

ENTERED ON DOCKET
DATE MAR 18 1996

ORDER

Before the Court are a Motion For Judgment on the Pleadings (Docket #11) filed by Defendant United States Junior Chamber of Commerce ("Junior Chamber") as to Plaintiff Cathy Sullins' fifth claim for relief; and a Motion for Summary Judgment (Docket #12) filed by Defendants Stephen Lawson and Gary Tompkins.

I. Defendant Junior Chamber's Motion for Judgment on the Pleadings.

Plaintiff filed her Complaint on August 21, 1995, alleging hostile work environment, quid pro quo sexual harassment, and sexual discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"); sexual discrimination and harassment in violation of Oklahoma's Anti-Discrimination Act, Okla Stat. Ann.

tit. 25, § 1302 (West 1987) ("OADA"); intentional infliction of emotional distress; constructive discharge; and tortious breach of contract. This Court, on October 17, 1995, dismissed the Title VII and OADA claims against individual Defendants Mark Henson, Steven Lawson, and Gary Tompkins.

Plaintiff's fifth cause of action alleges that Defendant Junior Chamber has constructively discharged Plaintiff in violation of Title VII, which has become public policy in the state of Oklahoma. In its motion for judgment on the pleadings, Defendant Junior Chamber claims that Plaintiff's fifth cause of action should be dismissed. Defendant asserts that, since Plaintiff's claims are based solely on her status (sex), and since she has an adequate remedy under the 1991 amendments to Title VII, her common law action for tortious breach of contract fails to state a claim for which relief can be granted.

The Supreme Court of Oklahoma first adopted the public policy exception to the termination at-will rule for employees in Burk v. K-Mart Corp., 770 P.2d 28 (Okla. 1989). The Burk court held that "[a]n employer's termination of an at-will employee in contravention of a clear mandate of public policy is a tortious breach of contractual obligations." Id. at 28.

Defendant relies on a certified question asked of the Oklahoma Supreme Court by the United States District Court for the Northern District of Oklahoma in List v. Anchor Paint Manufacturing Company, et al., 67 O.B.J.No. 2, 127, 1996 WL 5836 (January 9, 1996). In List, the Oklahoma Supreme Court considered, in an age

discrimination suit, the following question:

> Does Oklahoma recognize a claim for wrongful discharge in violation of public policy predicated upon conduct by an employer which the employee claims resulted in constructive discharge of that employee?

Id. at 1.

The Oklahoma Supreme Court answered "no" to the above question as asked, concluding that:

> [Plaintiff] has adequate statutory remedies, and his claim is not based on retaliation for anything that he did. Instead, Mr. List's claim is based solely on his status, his age. Because Mr. List's statutory remedies are adequate **and** his common law claim is based solely on his status, his statutory remedies are exclusive. Thus, he has no common law remedy for constructive discharge. Id. at 4. (emphasis added).

The Oklahoma Supreme Court, in List, focused on two factors when determining if a plaintiff's statutory remedies are exclusive: (1) the adequacy of the statutory remedies; and (2) the type of discrimination involved, on which the plaintiff's complaint is based. In List, the plaintiff a claimed violation of rights under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. The court held that "[plaintiff] has adequate remedies for age discrimination under statute." Id. at 3. The List court compared the remedies which were available to the plaintiff in the case of Tate v. Browning-Ferris, 833 P.2d 1218 (Okla. 1992), under Title VII, to the remedies available to the plaintiff in List. Tate was based on the racially motivated discharge of an employee. List concluded that the plaintiff in that case, if successful,

"would have significantly greater statutory remedies than were available in Tate." List, 1996 WL 5836 at 2.

The second consideration of the List court was the "type of discrimination involved," which "has been an important factor in courts deciding whether they will hold that statutory remedies preempt common law remedies." Id. at 3. The Oklahoma Supreme Court found that most courts only allow common law retaliatory discharge actions when the discharge arises "from the employee's acts, rather than his status." Id. The court noted that examples of conduct (acts) which caused employees to get fired are " . . . refusing sexual advances of supervisors ... " Id. at 3. (See, e.g., Tate, 833 P.2d at 1223 n. 21 (providing other state decisions allowing or disallowing a common law remedy for employment discrimination based upon a state's "statutory and common law norms")). In List, the court found that plaintiff's claim was based "solely on his status, his age" and that "his claim is not based on retaliation for anything that he did." Id. at 4.

Applying these two factors to the case at bar, this Court concludes that, as noted by Defendant, Plaintiff does have available remedies under Title VII. See 28 U.S.C. § 1981(a). However, unlike the List case, Plaintiff's claim is based on retaliation for something she did, namely, refusing to date two employees of the Defendant Junior Chamber. From the clear language of List, for a Plaintiff's common-law claim of wrongful discharge to be preempted by either Title VII or by the OADA, the plaintiff must have adequate statutory remedies **and** the claim must be based

on employee status, not on employee acts.

This is not the case here. Plaintiff is not claiming that she was constructively discharged merely because she is a female (her status). Instead, she is claiming that she was constructively discharged because of her refusal to date employees of Defendant Junior Chamber.

In the context of a racially motivated wrongful discharge, the Tate court found "no obstacle to applying Burk's common-law tort to a racially motivated wrongful or retaliatory discharge." According to Tate, with regards to the OADA, there was "no textually demonstrable legislative intent to make the Title 25 remedies for racial discrimination exclusive." Tate, 833 P.2d at 122.[1]

Based upon the holding in Tate, and the factual difference between List and the case at bar with regard to Plaintiff's acts leading to the alleged constructive discharge, this Court concludes that Defendant Junior Chamber's motion for judgment on the pleadings with regard to Plaintiff's fifth cause of action should be denied.

II. Defendants Stephen Lawson and Gary Tompkins' Motion for Summary Judgment.

On October 17, 1995, this Court dismissed all claims against individual Defendants Mark Henson ("Henson"), Stephen Lawson

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[1] The Tate court provided an example of an Oklahoma statute which expresses exclusivity of a created remedy. See the Workers Compensation Act, Okla. Stat. Ann. tit. 85, §12 (West 1992): "The liability prescribed . . . shall be exclusive and in place of all other liability of the employer . . . at common law or otherwise . . .".

("Lawson"), and Gary Tompkins ("Tompkins"), with the exception of Plaintiff's claim for intentional infliction of emotional distress. Defendants Lawson and Tompkins move for entry of summary judgment as to this remaining claim, alleging that no genuine issue of material fact exists.

Plaintiff alleges, and Defendants accept as true for the purpose of this motion, the following relevant facts:

1. Plaintiff Cathy Sullins ("Sullins") was an employee of Defendant Junior Chamber until September 12, 1994.

2. Lawson asked Sullins to go out with him two or three times.

3. At the Junior Chamber Christmas party in 1993, an employee (not Sullins) and her spouse heard Lawson say to Henson how good Sullins looked and that he (Lawson) would "get his turn with her."

4. While attending a Junior Chamber seminar in Washington, D.C. in September of 1993, Sullins heard Lawson unlock her hotel room door and walk in. Sullins was wearing only a towel, so she asked him to leave, which he did. After Sullins finished dressing, Lawson reentered and said that was the most fun he had had all weekend.

5. During a November 1993, business trip in Hong Kong, Tompkins entered Sullins' room, put his arms around Sullins and gave her a hug before kissing her. That evening Sullins, Tompkins and a fellow employee went out to dinner.

6. In February 1994, Tompkins asked Sullins out to dinner, which she accepted.

7. Lawson once told Sullins that she did not smile at him enough, and Lawson once told Sullins "that he would rather I [Sullins] make a thousand f**k-ups and smile at him [Lawson] more." (See deposition of Sullins, 11-1-95, pp. 107-08).

8. Animosity and strife had developed by late 1993 and early 1994 between Pat DeCorte, who was Sullins' boyfriend, and Mark Henson, Lawson's good friend, concerning Sullins. Lawson fired Sullins in February 1994, after Henson told Sullins that if she started dating DeCorte again, Henson would "become my [Sullins'] "worst f**king nightmare at work." (See deposition of Sullins, 11-1-95, p. 93).

9. Sullins initially sought medical treatment from a psychologist on two or three occasions to obtain treatment for her emotional distress. Later, Sullins was referred to a doctor, who prescribed anti-depressants to Sullins.

10. Sullins was told she was suffering from severe depression and that counseling would be ineffective until Sullins received medication. Sullins had a "bad reaction" to the medication, and the medical costs became so expensive that she had to discontinue her treatment. (See deposition of Sullins, 11-1-95, p. 122).

11. Sullins continues to suffer from "severe depression" which she has referred to as "debilitating."

In considering a motion for summary judgment, this Court must examine the facts in a light most favorable to the nonmoving party. Dillon v. Fibreboard, 19 F.3d 1488 (10th Cir. 1990) (quoting Abercrombie v. City of Catoosa, 896 F.2d 1228 (10th Cir. 1990)).

Summary judgment, pursuant to Fed.R.Civ.P. 56(e), is only appropriate when there exists no issue genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2510 (1986). If a reasonable person could find for the non-moving party, there is a genuine issue of material fact and summary judgment is inappropriate. Id. at 2512.

Defendants assert that Plaintiff's claim of intentional infliction of emotional distress is subject to Oklahoma's two-year statute of limitations. Defendants maintain that the alleged incidents of September 1992, in which Lawson asked Sullins to go to a movie, and when Tompkins kissed Sullins in a hotel elevator, should be barred pursuant to 12 Okla. Stat. Ann. § 95(3). Defendants rely on Williams v. Lee Way Motor Freight, Inc., 688 P.2d 1294 (Okla. 1984), in which the Oklahoma Supreme Court concluded that the two-year statute of limitations provided by 12 Okla. Stat. Ann. § 95(3) governs claims of intentional infliction of emotional distress. Id. at 1298.

Plaintiff relies on Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410 (10th Cir. 1993), in which the Tenth Circuit Court of Appeals held that in a Title VII action, a claim may include incidents "which occurred outside the statutory time limitations of Title VII if the various acts constitute a `continuing pattern of discrimination.'" Id. Plaintiff's argument is flawed, however, because the Martin case dealt specifically with the 300-day limitations period outlined in 42 U.S.C.A. § 2000e-5(e) (West 1994). The Martin court, even though there was a pendent state law

claim for intentional infliction of emotional distress, did not address the issue of whether the "continuing course of conduct" doctrine applies to the limitations period for intentional infliction of emotional distress claims. See id. at 1414-15. Nevertheless, Defendants maintain that none of the incidents involving Lawson and Tompkins, even those allegedly barred by the statute of limitations, could reasonably be regarded as giving rise to a claim for intentional infliction of emotional distress.

The Oklahoma Supreme Court, in Eddy v. Brown, 715 P.2d 74, 76 (Okla. 1986), recognized the independent tort of intentional infliction of emotional distress. The Eddy court held that in determining whether an action for this tort exists, the narrow standard of Restatement (Second) of Torts § 46 should be applied. Id. Section 46 provides, in relevant part:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Restatement (Second) of Torts, § 46 (1977). According to Eddy, "[i]t is the trial court's responsibility initially to determine whether the defendant's conduct may reasonably be regarded as sufficiently extreme and outrageous to meet the § 46 standards." Id. (See Breeden v. League Services Corp., 575 P.2d 1374, 1377 (Okla. 1978)). "Where, under the facts before the court, reasonable persons may differ, it is for the jury, subject to the control of the court, to determine whether the conduct in any given

case has been significantly extreme and outrageous to result in liability." Breeden, 575 P.2d at 1377.

In determining whether conduct is "sufficiently extreme and outrageous" to give rise to a claim of intentional infliction of emotional distress, the Oklahoma Supreme Court held that "[c]onduct which, though unreasonable, is neither `beyond all possible bounds of decency' in the setting in which it occurred, nor is one that can be `regarded as utterly intolerable in a civilized community,' falls short of having actionable quality." Eddy, 715 P.2d at 77; See also Restatement (Second) of Torts, § 46 cmt. d (1977). In the recent decision of Starr v. Pearle Vision, Inc., 54 F.3d 1548 (10th Cir. 1995), the Tenth Circuit Court of Appeals, in applying Oklahoma law, held that "[n]othing short of `extraordinary transgressions of the bounds of civility' will give rise to liability for intentional infliction of emotional distress." Id. at 1558 (quoting Merrick v. Northern Natural Gas Co., 911 F.2d 426, 432 (10th Cir. 1990)).

In determining whether a jury could reasonably conclude that particular conduct was indeed "extreme" or "outrageous," this Court must focus "on the totality of the circumstances, including the nature of the conduct and the setting in which it occurred." Starr, 54 F.3d at 1559. In analyzing the relevant facts in a light most favorable to the Plaintiff, this Court concludes that Defendants Lawson's and Tompkins' conduct does not rise to the

level of "extreme" or "outrageous."[2]

Defendants Lawson and Tompkins' alleged conduct, to which Defendants stipulate for purposes of their motion for summary judgment, while inappropriate for the employment setting and potentially actionable under Title VII,[3] does not rise to the "extreme" or "outrageous" level described by the Supreme Court of Oklahoma. After Lawson walked into Sullins' hotel room while she was changing her clothes, Sullins asked him to leave until she finished dressing (which he did). At the November 1993, business trip in Hong Kong, Tompkins asked Sullins to dinner, which she accepted. This took place after Tompkins kissed Sullins in Hong Kong on November 19, 1993, and after Tompkins kissed Sullins in an elevator in Washington, D.C.

With regards to the comments made to Sullins by the Defendants, "the Oklahoma Supreme Court has explained that liability for [intentional infliction of emotional distress] does not extend to `mere insults, indignities, threats . . . [or] occasional acts that are definitely inconsiderate and unkind."

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[2] For the purposes of this analysis, the Court assumes that none of Defendant's alleged actions is barred by the applicable statute of limitations.

[3] See, e.g., Paroline v. Unisys Corp., 879 F.2d 100, 113 (4th Cir. 1989), where the Fourth Circuit held "[t]here is nothing inconsistent in allowing [plaintiff] to proceed to trial on her sexual harassment and constructive discharge claims, while holding that the behavior to which she was subjected was insufficiently outrageous as a matter of law to establish a claim for intentional infliction of emotional distress. Behavior may fall short of outrageousness for purposes of Virginia's tort law and yet give rise to Title VII liability for sexual harassment and constructive discharge." Id.

Starr, 54 F.3d at 1558 (quoting Eddy, 715 P.2d at 77).

The Fourth Circuit Court of Appeals decision in Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989), contained facts comparable to the instant action. In that case, a female plaintiff ("Paroline") brought a Title VII action with pendent state claims, one of which was intentional infliction of emotional distress, against her employer ("Unisys") and a male employee ("Moore"). The facts viewed in a light most favorable to the plaintiff showed that, among other things, Moore had made sexually suggestive remarks to Paroline which she considered offensive, and that Moore approached and touched Paroline while she was working. Id. at 103.

In Paroline, the Fourth Circuit affirmed the United States District Court for the Eastern District of Virginia's ruling in favor of defendant's motion for summary judgment with regards to the intentional infliction of emotional distress claim. The Fourth Circuit held that "[e]ven if we accept all of [plaintiff's] allegations as true and drew all reasonable inferences in her favor, the alleged harassment to which she was subjected would not rise to the level of outrageous required under the strict standards imposed by Virginia law." Id. at 112-13. It should be noted that, as in Oklahoma, "[t]he Restatement of Torts provides guidance as to the proper interpretation of outrageousness under Virginia Law." Id. at 112 (quoting Gaiters v. Lynn, 831 F.2d 51, 53 (4th Cir. 1987)).

The Court finds the Fourth Circuit's reasoning in Paroline persuasive. In light of the Tenth Circuit Court of Appeals and the

Supreme Court of Oklahoma's adoption of the "standards of § 46 Restatement of Torts (Second)," see Starr, 54 F.3d at 1558; Eddy, 715 P.2d at 76, this Court concludes as a matter of law that a reasonable person could not find that Lawson's and Tompkins' conduct in this action was "extreme" or "outrageous" as defined by the Restatement or the relevant case law. For this reason, Defendants' motion for summary judgment as to Plaintiff's claim of intentional infliction of emotional distress is granted.

In summary, Defendant Junior Chamber's motion for judgment on the pleadings is DENIED. Defendants Lawson and Tompkins' motion for summary judgment is GRANTED.

IT IS SO ORDERED, this 14th day of March, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED
MAR 15 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY DALE, PLAINTIFF, VS. RONALD J. CHAMPION, and MARY CARTER, DEFENDANTS.	CASE NO. 95-C-190-B
LARRY DALE, PLAINTIFF, VS. BRAD PAYAS, and PAULA POTTS, DEFENDANTS.	CONSOLIDATED WITH CASE NO. 95-C-191-B

ENTERED ON DOCKET
MAR 18 1996

J U D G M E N T

Pursuant to Order entered March 8, 1996, granting summary judgment in favor of the Defendants, Ronald J. Champion, Mary Carter, Brad Payas and Paula Potts, and against the Plaintiff Larry Dale, in this consolidated case, judgment is herewith entered in favor of the Defendants, Ronald J. Champion, Mary Carter, Brad Payas and Paula Potts, and against the Plaintiff Larry Dale, in this consolidated case. Costs are assessed against the Plaintiff if timely applied for pursuant to Local Rule 54.1 and attorneys fees are to be borne by each respective party.

IT IS SO ORDERED this 15th day of March, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TIMOTHY C. AUSTIN

Plaintiff,

vs.

WASHINGTON COUNTY SHERIFF DEPARTMENT,

Defendant.

No. 95-CV-902 K

ENTERED ON DOCKET
DATE MAR 18 1996

FILED
MAR 15 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the motion for summary judgment (Docket #11) of Defendants, Washington County Sheriff Department and Sheriff Pat Ballard, and the response (Docket #13) of Plaintiff, Timothy C. Austin. For the reasons stated below, the Court concludes that Defendants' motion for summary judgment should be denied in part and that Plaintiff should be granted an opportunity to amend his complaint.

I. BACKGROUND

In September 1995, Plaintiff Timothy Cedrick Austin ("Austin") brought this *pro se* and *in forma pauperis* civil rights action against Washington County Sheriff Department. Pursuant to 42 U.S.C. §1983, Austin alleged he was denied proper medical attention for a preexisting condition of glaucoma, denied medications for intense headaches caused by increasing eye pressure, suffered substantial loss of eyesight, and was improperly billed for the medical expenses incurred during his incarceration.

In December 1995, Defendants, Washington County Sheriff's

Department and Sheriff Pat Ballard, moved for summary judgment as to all claims against them premised on the following: (1) No policy of the Sheriff's Department deprived Austin of a constitutional right; (2) Defendant Ballard is entitled to qualified immunity; (3) Austin has failed to state any constitutional violations by Defendant Ballard; and (4) Defendant Washington County Sheriff's Department is not a suable entity. For purposes of its motion, the Defendants have assumed the Sheriff is being sued officially and individually.[1]

Austin was booked into the Washington County Jail on August 1, 1995, on charges of embezzlement, obstructing the police and obstructing justice. (Special Report, Ex. A , Doc. #12). In Defendants' motion and Special Report, they indicate during medical screening, Austin did not advise that he had any medical problems concerning his eyes except that he wore prescription glasses. Defendants contend that prior to August 7, 1995, Plaintiff had not requested medical treatment. On August 7, Plaintiff requested permission to contact his physician in Kansas. Officer Duncan requested Austin to complete a medical sheet for the weekly visit by the county jail doctor on August 11. In the interim, Officer Duncan contacted Austin's doctor's office, where he was informed that Austin had not kept the last four scheduled appointments, the last of which was January 19, 1995. Later, Duncan received a

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[1] The Defendants have assumed that the complaint properly names Sheriff Ballard, although Austin neither names Ballard in the caption nor Part A of the complaint. The U.S. Marshal Office served summons and form USM-285 on Sheriff Ballard.

return telephone call from Plaintiff's physician, Dr. Lind, advising him that Austin had severe glaucoma which had been corrected by surgery on the right eye in October 1994 and on the left eye in November 1994, was tapered off his medication following surgery, and "strongly" recommended a follow-up visit with a physician. (Ex. 3, Doc. #12). That same afternoon, Duncan received a telephone call from Austin's sister, stating that she had talked with Dr. Lind also and he had recommended that Austin see an ophthalmologist as soon as possible. While his attempts to again contact Dr. Lind or Austin's sister were unsuccessful, Officer Duncan contacted a Dr. Mitriv of Kansas University Opthamology. Dr. Mitriv was familiar with Austin's condition and informed Duncan that Austin should be seen by a physician before the regular weekly visit and that Austin could become blind if infection developed.

On August 8, 1995, Officer Duncan telephoned Dr. Kelly, the county jail doctor, who advised Duncan to call another doctor, a Dr. Baker. Around 5:20 p.m. that afternoon, Dr. Baker examined Austin, prescribed some eye drops and recommended tinted glasses. Dr. Baker indicated that Austin was blind in his right eye and advised a follow-up appointment in two weeks. Austin was later provided a pair of sunglasses by the officer.

Again on August 11, Austin was seen by Dr. Kelly, who prescribed pain medication for Austin's headaches. Still complaining of pain in his left eye, the next day Austin was treated at the Jane Phillips Medical Center Emergency Room. Then on August 15, Officer Duncan attempted to contact Dr. Baker

concerning Austin's request to increase the eye drops, but Dr.

concerning Austin's request to increase the eye drops, but Dr. Baker was in surgery and unavailable. Around noon that day, a relative of Austin's came to the jail and advised Officer Duncan that Austin's eyesight was completely gone. Dr. Kelly was again telephoned and he directed Officer Duncan to take Austin to the emergency room. Upon arrival, the emergency room personnel refused to treat Austin due to the nature of his eye problems. Later that day Dr. Baker examined Austin, prescribed medication for a mild inflammation of the right eye, and instructed Austin not to increase the eye drops but to continue usage in the left eye.

On August 17, 1995, 4:52 p.m., Austin was released from the Washington County Sheriff's Department to the custody of the Douglas County Sheriff's department with the prescriptions and instructions concerning his eyes. According to the Defendants' exhibits and the Special Report, Austin was provided medication as prescribed and instructed by the doctors. Defendants contend Plaintiff received continuous, prompt and professional medical attention during his incarceration.

Contrary to the Special Report, Austin claims he mentioned his eye condition to the officer when he was booked on August 1, but "he [the officer] just didn't record it." Plaintiff admits he had undergone surgery for glaucoma and no medication was necessary at the time he was jailed. However, on August 4, 1995, Austin began to experience severe headaches, signaling a rise in the eye pressure, which was adversely affected by the "bright lights" in his cell. Despite his repeated requests and insistence of a "medical

emergency" on August 4, 5 and 6, Austin alleges Defendants refused to give him any pain medication, or to dim the lights in his cell, or to take him to a doctor. Finally on August 7, 1995, after Austin's continued insistence, Plaintiff's physician was contacted. On the following day, August 8, Austin claims he was finally taken to a doctor, but only "after complete loss of sight in the right eye and loss of eyesight to left eye." (Complaint, ¶C(2)). Again, on August 10 and August 13, Plaintiff claims his requests for pain medication were ignored. Even though the jailer said he would bring the medication, "I never received them." (Complaint, attachment, p.2). Austin claims he did not "get immediate medical attention" and "made unable to follow thru on medical advice." (Complaint, B. ¶1). Austin also states he is being billed for the emergency room treatment. Plaintiff has attached an affidavit signed by several of the inmates, attesting as witnesses to "the neglect on several occasions to give immediate medical attention to Cedric Austin" from August 4 to August 7 (1995).

II. SUMMARY JUDGMENT STANDARDS

The court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is not a disfavored procedural shortcut, but an integral part of the federal rules as a whole. Celotex Corp. V. Catrett,

477 U.S. 317 (1986). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. Conclusory allegations are insufficient to establish a genuine issue of fact. McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). Nor does the existence of an alleged factual dispute defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

The court may treat the Martinez report as an affidavit in support of the motion for summary judgment, but may not accept the factual findings of the report if the prisoner has presented conflicting evidence. See Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991). This process aids the court in determining possible legal bases for relief for unartfully drawn pro se prisoner complaints, and not to resolve material factual issues. Id. at 1109. The court must also construe the Plaintiff's pro se pleadings liberally. Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991).

III. DISCUSSION

The Supreme Court has established two necessary elements for

recovery of damages under a 42 U.S.C. § 1983 civil rights claim. A plaintiff must prove that the defendant deprived him of a right secured by the United States Constitution and, the defendant deprived plaintiff of this right under color of state law. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970). In this case, there is no dispute that all actions were taken under color of state law. The only issue is whether Austin suffered a constitutional deprivation by the Defendant's refusal to provide adequate medical treatment.[2]

Before reaching this issue, the Court finds the Washington County Sheriff's Department is not a proper legal entity which can be sued in this civil rights action. Numerous courts have recognized that a sheriff or police department is not a proper defendant in a section 1983 action. Rhodes v. McDannel, 945 F.2d 117, 120 (6th Cir. 1991); Thompson v. Duke, 882 F.2d 1180 (7th Cir. 1989); Ginter v. Stallcup, 869 F.2d 384 (8th Cir. 1989); Tanner v. Heise, 879 F.2d 572 (9th Cir. 1989); Martinez v. Winner, 771 F.2d 424, 444 (10th Cir. 1985); Dean v. Barber, 951 F.2d 1210 (11th Cir. 1992). Therefore, the Court grants the motion for summary judgment

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[2] The Tenth Circuit has held that failure to provide adequate medical care for a pretrial detainee constitutes a Fourteenth Amendment deprivation of life or liberty without due process as opposed to the Eighth Amendment, which does not apply until after an adjudication of guilt. Nevertheless, pretrial detainees are in any event entitled to the same degree of protection against denial of medical attention as prisoners. Meade v. Grubbs, 841 F.2d 1512, 1530 (10th Cir. 1988) quoting Estelle v. Gamble, 429 U.S. 97, 104-05 (1976); see also Garcia v. Salt Lake County, 768 F.2d 303, 307 (10th Cir. 1985). From the record it appears that Austin is a pretrial detainee to whom protection under the due process clause would apply.

of Washington County Sheriff Department and directs the Clerk to add Sheriff Ballard as a defendant in this action.

In the context of civil rights claims against government officials, a defendant may not be held individually liable under section 1983 unless the defendant caused or participated in the alleged constitutional deprivation. Housley v. Dodson, 41 F.3d 597, 600 (10th Cir. 1994). Mere supervisory status, without more, will not create liability in a Section 1983 action. Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991). To establish liability against a supervisor, a plaintiff must show facts which demonstrate the supervisor's personal involvement in the unconstitutional activities of his subordinates; at a minimum, the plaintiff must show knowledge or "deliberate indifference" to the subordinates' actions. Volk v. Coler, 845 F.2d 1422, 1431 (7th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512, 1527-28 (10th Cir. 1988). In the present case, Sheriff Ballard will be held individually liable only if, by his own conduct, he deprived the Plaintiff of any rights secured under the Constitution. See Rizzo v. Goode, 423 U.S. 362, 377 (1976); Duckworth v. Franzen, 780 F.2d 645, 650 (7th Cir.1985), cert. denied, 479 U.S. 816 (1986).

To the extent Plaintiff seeks to sue Sheriff Ballard in his official capacity under section 1983, Plaintiff must allege that he suffered injuries of a constitutional magnitude as the result of an official policy, custom, or practice. Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978); Meade, 841 F.2d at 1529. This may be shown by proving there are such gross deficiencies in

staffing, facilities, equipment or procedures that the inmate is effectively denied access to adequate medical care. Garcia, 768 F.2d 303, 308 (10th Cir. 1985) (citations omitted). The complaint must set out some fact or facts to suggest that the claimed policy or custom actually exists, that the alleged deprivation was not an "isolated" incident, and that there is a direct causal link between the policy or custom and the injury alleged. City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2457, 85 L.Ed.2d 791 (1985); see also Hinton v. City of Elwood, Kan., 997 F.2d 774, 782 (10th Cir. 1993).

In light of Plaintiff's *pro se* status and the fact that leave to amend should be "freely given" under Fed. R. Civ. P. 15(a), the Court grants Plaintiff an opportunity to amend his complaint to name Sheriff Ballard as a Defendant in either his individual and/or official capacities.[3] Plaintiff has alleged no facts to suggest that a custom or policy of the Washington County Sheriff's Department evidencing deliberate indifference to the medical needs of a pretrial detainee exist, or any facts supporting an inference of one, which is essential for municipal liability. There are no allegations of any derelictions of supervisory duties or of general failure to have medical care available. Nor has Plaintiff alleged Sheriff Ballard was personally involved in the alleged constitutional violations.

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[3] Although Plaintiff discusses the involvement of Jailer Jimmy Lee and Officer Duncan in the body of the complaint, he does not name either of them in the caption or Part A of the complaint.

"A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. Hall v. Belmon, 935 F.2d 1106, 1109 (10th Cir. 1991). This broad reading of a *pro se* plaintiff's complaint does not, however, relieve him of the burden of alleging sufficient facts on which a cognizable claim could be based. Id. Even so, a *pro se* plaintiff who fails to allege sufficient facts is to be given a reasonable opportunity to amend his complaint if justice so requires. See Roman Nose v. New Mexico Dept. Of Human Services, 967 F.2d 435, 438 (10th Cir. 1992).

IV. CONCLUSION

Defendant's motion for summary judgment (docket #11) is GRANTED as to Washington County Sheriff Department and DENIED WITHOUT PREJUDICE in all other respects. Plaintiff is GRANTED twenty (20) days within which to submit a motion for leave to amend and a proposed amended complaint. Plaintiff's proposed amended complaint shall be on the civil-rights-complaint form and shall be complete in itself including exhibits, if any, without reference to the superseded complaint. Local Rule 9.3.C. The Clerk shall ADD Sheriff Ballard as a Defendant on the docket sheet.

SO ORDERED THIS 15 DAY OF MARCH, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 15 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

TOMMY CRAVENS,

Plaintiff(s),

vs.

AMKO SALVAGE CO., et al,

Defendant(s).

Case No. 95-C-214-B

ENTERED ON DOCKET
DATE MAR 18 1996

JUDGMENT DISMISSING ACTION BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 15th day of March, 1996

THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 14 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ODELL FOX and SHARON FOX,

Plaintiffs,

vs.

DWIGHT W. MAULDING, WALTER E. BROWN, JOHN B. CLARK, MIKE BEZANSON, MARK A. GISH, WILEY W. SMITH, C.F. BARTLETT, H.I. BARTLETT, B. B. BINGMAN, J.M. BINGMAN, E.D. HAMILTON, L.T. JACKSON, JR., J.L. ROBERTSON, J.M. DAVIS, EDWARD A. CARSON, J.W. SHERWOOD, SECURITY NATIONAL BANK OF SAPULPA, a national banking association, and SECURITY BANKSHARES OF SAPULPA, INC.,

Defendants.

Case No. 91-C-341-E

ENTERED ON DOCKET
DATE MAR 15 1996

ORDER

Now before the Court is the Motion to Dismiss (Docket # 118) of the Defendants Dwight W. Maulding, John B. Clark, Mike Bezanson, Mark A. Gish, Wiley W. Smith, C. F. Bartlett, B.B. Bingman, J.M. Bingman, E.D. Hamilton, L.T. Jackson, Jr., J.L. Robertson, J.M. Davis, Edward A. Carson, J.W. Sherwood, Security National Bank of Sapulpa and Security National Bankshares of Sapulpa, Inc. (collectively, "the bank").

Plaintiffs brought this claim in 1991, alleging RICO violations, fraud and constructive fraud on the part of the defendants. Plaintiffs assert that the defendants improperly forced them to give a

share of their ownership in certain properties in return for loans. Plaintiffs also assert that, as a result of defendants' improper practices, they lost their life savings and their home. They allege that the bank foreclosed on their home, and then purchased it at an a tax sale for a fraction of its value.

Defendants moved to dismiss plaintiffs' claims on the basis of the Colorado River Doctrine, Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), arguing that this court should abstain from exercising its jurisdiction due to a "parallel" state court fraud action, a mortgage foreclosure and a state court partnership dissolution action.[1] This court applied Colorado River, and stayed this claim pending determination of the state court cases. While the Order staying this action was on appeal, the state court claims were resolved, and both parties agreed the case should be remanded from the tenth circuit, and the stay lifted. The Defendants, however, urged that, when the stay was lifted, the matter should be dismissed under the doctrines of claim preclusion and issue preclusion.[2] The case has now been remanded, the stay lifted, and the motion to dismiss is ripe for determination.

Defendants argue that the judgments in the state court proceedings should preclude this action. Here, Defendants assert both issue preclusion, based on the factual findings that were made in the dissolution action, and claim preclusion, based on the failure to make this claim at the time the Fox's property was foreclosed upon. Defendants premise their argument on findings made by the Court in its Findings of Fact and Conclusions of Law of July 12, 1994:

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[1] The Foxes also filed a RICO claim in the District Court of Creek, County, Oklahoma, in 1989, which was later dismissed.

[2] Defendants also argue that the RICO claims are not pled with particularity, that they are barred by the statute of limitations, and that when the RICO claims are dismissed, the pendent state claims should also be dismissed. However, the Court does not reach these arguments in this Order.

8. The factual allegations regarding breach of fiduciary duty in the Third Amended Complaint are allegations regarding the conduct of the partnership which must also be addressed in the dissolution action.

5. e. Vexatious or reactive nature of either action. It appears from the record that both the state Fraud action and the instant suit are indirect challenges to the foreclosure which should have been asserted as mandatory counterclaims in that action. This factor weighs very heavily in favor of abstention by this Court.

f. Federal or state law as providing the rule of decision - federal law will provide the rule of decision if this case is properly brought under RICO. However, on this record, the Court concludes that Plaintiff's Third Amended Complaint describes a simple fraud cause of action.

Plaintiffs argue that neither claim preclusion nor issue preclusion is applicable because the foreclosure and dissolution actions did not resolve all substantive claims in the RICO case. However, while Plaintiffs demonstrate that certain claims were not raised in state court, what they fail to address is whether these claims could have been raised in the state court actions.

Under Oklahoma law, which is applicable here, res adjudicata, or claim preclusion prevents parties or their privies from relitigating not only an adjudicated claim, but also any theories or issues that were either actually decided or could have been decided in that action. McIntosh v. Limestone National Bank, 894 p.2d 1145, 1147 (Okla. App. 1995). In particular, compulsory counterclaims[3] cannot be raised in a subsequent action because of claim preclusion. Id. Issue preclusion, on the other hand, prevents relitigation of that an issue that has already been finally determined, in a suit on a different cause of action involving a party to the first case. Veiser v. Armstrong, 688 P.2d 796,

[3] Okla.Stat.tit.12, §2013 governs compulsory counterclaims and provides in pertinent part: "A. **COMPULSORY COUNTERCLAIMS.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

800, n.9 (1984).

The Court concludes, based on its previous Findings of Fact and Conclusions of Law, that the fraud claims brought in this action constitute either compulsory counterclaims to the foreclosure action, or were determined in the partnership dissolution action. The Court specifically notes that Massey v. City of Oklahoma City, 643 F.Supp. 81 (W.D. Okla. 1986) does not change this result. Massey holds that a RICO claim is not barred by claim preclusion if the initial suit was brought in state court, because state court does not have jurisdiction over RICO claims, and, therefore, the RICO claim is not a claim that "could have been litigated" at the state court level. However, this Court has already held that plaintiff's complaint states simple fraud claims, and Massey is no longer good law. See Tafflin v. Levitt, 110 S.Ct. 792 (1990). Moreover, the holding of one district court is not dispositive of whether the RICO claim could have been brought in state court, and it should be noted that there was a split within the Tenth Circuit on this issue. See Reeder v. Kermit Johnson, Alphagraphics, Inc., 723 F.Supp. 1428 (D. Utah 1989).

The Motion to Dismiss (Docket #118) of the Defendants is granted.

IT IS SO ORDERED THIS 13th DAY OF ~~FEBRUARY~~ March, 1996.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 14 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JIMMY LEGATES,)
Plaintiff,)
)
vs.)
)
SHIRLEY S. CHATER, Commissioner)
Social Security Administration,) **Case No. 94-C-117-M**
Defendant.)

ORDER APPROVING PLAINTIFF'S ATTORNEY FEES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

ENTERED ON DOCKET
DATE MAR 15 1996

ON this 14 day of March, 1996, before me, the undersigned United States Magistrate Judge, *Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act*, comes on for hearing. The Court FINDS that Plaintiff and Defendant filed a *Stipulation for Award of EAJA Attorney Fees,* pursuant to 28 U.S.C. §2412(d), wherein they have mutually agreed upon an attorney fee payable to Plaintiff's counsel in the amount of $ 3,525.00 .

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the Commissioner pay to Plaintiff's attorney the sum of $ 3,525.00 , and Plaintiff's *Motion* is hereby dismissed.

S/Frank H. McCarthy
U.S. Magistrate
UNITED STATES MAGISTRATE JUDGE

Approved as to Form and Content:

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oeajano3/oelegat1-r

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 14 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARLIN LEE ENGLIND aka Marlin L. Englind; CYNTHIA KAY ENGLIND; UNKNOWN SPOUSE OF Marlin Lee Englind aka Marlin L. Englind, if any; UNKNOWN SPOUSE OF Cynthia Kay Englind, if any; THE TULSA DEVELOPMENT AUTHORITY; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95-C 244B

ENTERED ON DOCKET
DATE MAR 15 1996

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 14 day of March, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, appears by Tammy Bruce Whitham, OBA Firm #44; and the Defendants, MARLIN LEE

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT

ENGLIND aka Marlin L Englind, CYNTHIA KAY ENGLIND, UNKNOWN SPOUSE of Marlin Lee Englind aka Marlin L. Englind, if any, UNKNOWN SPOUSE OF Cynthia Kay Englind, if any, and THE TULSA DEVELOPMENT AUTHORITY, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, CYNTHIA KAY ENGLIND, was served a copy of Summons and Complaint on August 15, 1995, by Certified Mail; that the Defendant, THE TULSA DEVELOPMENT AUTHORITY, signed a Waiver of Summons on March 3, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on March 17, 1995, by Certified Mail; and that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, was served a copy of Summons and Complaint on March 17, 1995, by Certified Mail.

The Court further finds that the Defendants, MARLIN LEE ENGLIND aka Marlin L. Englind, UNKNOWN SPOUSE OF Marlin Lee Englind aka Marlin L. Englind, if any, and UNKNOWN SPOUSE OF Cynthia Kay Englind, if any, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning September 18, 1995, and continuing through October 23, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, MARLIN LEE ENGLIND aka Marlin L. Englind, UNKNOWN SPOUSE OF Marlin Lee Englind aka Marlin L. Englind, if any and UNKNOWN SPOUSE OF Cynthia Kay Englind, if any, and

service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, MARLIN LEE ENGLIND aka Marlin L. Englind, UNKNOWN SPOUSE Marlin Lee Englind, if any, and UNKNOWN SPOUSE OF Cynthia Kay Englind, if any. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on March 30, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on April 6, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, filed its Answer on April 21, 1995; and that the Defendants, MARLIN LEE ENGLIND aka Marlin L.

Englind, CYNTHIA KAY ENGLIND, UNKNOWN SPOUSE OF Marlin Lee Englind aka Marlin L. Englind, if any, UNKNOWN SPOUSE OF Cynthia Kay Englind, if any and THE TULSA DEVELOPMENT AUTHORITY, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, MARLIN LEE ENGLIND, is one and the same person as Marlin L. Englind, and will hereinafter be referred to as "MARLIN LEE ENGLIND." The Defendants, MARLIN LEE ENGLIND and CYNTHIA KAY ENGLIND, were granted a Divorce on April 15, 1992, Case No. FD 91-5874, in Tulsa County District Court.

The Court further finds that on November 20, 1992, Marlin Lee Englind filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-B-4056 W. On March 19, 1993, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on July 14, 1993.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT ONE (1), BLOCK ONE (1), WESTROPE ACRES SUBDIVISION, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on May 20, 1986, the Defendants, MARLIN LEE ENGLIND and CYNTHIA KAY ENGLIND, executed and delivered to CHARLES F. CURRY COMPANY, A MISSOURI CORPORATION, their mortgage note in the amount of

$34,305.00, payable in monthly installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, MARLIN LEE ENGLIND and CYNTHIA KAY ENGLIND, HUSBAND AND WIFE, executed and delivered to CHARLES F. CURRY COMPANY, A MISSOURI CORPORATION, a mortgage dated May 20, 1986, covering the above-described property. Said mortgage was recorded on May 28, 1986, in Book 4945, Page 926, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 17, 1989, CHARLES F. CURRY COMPANY, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his\her successors and assigns. This Assignment of Mortgage was recorded on June 8, 1989, in Book 5187, Page 2750, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 11, 1989, the Defendants, MARLIN LEE ENGLIND and CYNTHIA ENGLIND, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on April 27, 1990 and June 1, 1991.

The Court further finds that the Defendants, MARLIN LEE ENGLIND and CYNTHIA KAY ENGLIND, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, MARLIN LEE ENGLIND and CYNTHIA KAY

ENGLIND, are indebted to the Plaintiff in the principal sum of $47,388.45, plus interest at the rate of 10 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $22.00 which became a lien on the property as of June 26, 1992 and a lien in the amount of $20.00 which became a lien on the property as of June 25, 1993. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state income taxes in the amount of $226.06, plus accrued and accruing interest, which became a lien on the property as of October 9, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of $459.07 which became a lien on the property as of April 24, 1990. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, MARLIN LEE ENGLIND, CYNTHIA KAY ENGLIND, UNKNOWN SPOUSE OF Marlin Lee Englind, if any, UNKNOWN SPOUSE OF Cynthia Kay Englind, if any, and THE TULSA DEVELOPMENT AUTHORITY, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, MARLIN LEE ENGLIND and CYNTHIA KAY ENGLIND, in the principal sum of $47,388.45, plus interest at the rate of 10 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $44.00, plus costs and interest, for personal property taxes for the years 1991 and 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of $226.06, plus accrued and accruing interest, for state income taxes, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, have and recover judgment in the amount of $459.07 for its judgment, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, MARLIN LEE ENGLIND, CYNTHIA KAY ENGLIND, UNKNOWN SPOUSE OF Marlin Lee Englind, if any, UNKNOWN SPOUSE OF Cynthia Kay Englind, if any, THE TULSA DEVELOPMENT AUTHORITY and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, MARLIN LEE ENGLIND and CYNTHIA KAY ENGLIND, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, in the amount of $459.07, for its judgment.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $22.00, personal property taxes which are currently due and owing.

Fifth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $226.06, plus accrued and accruing interest, for state income taxes.

Sixth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $20.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right

to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

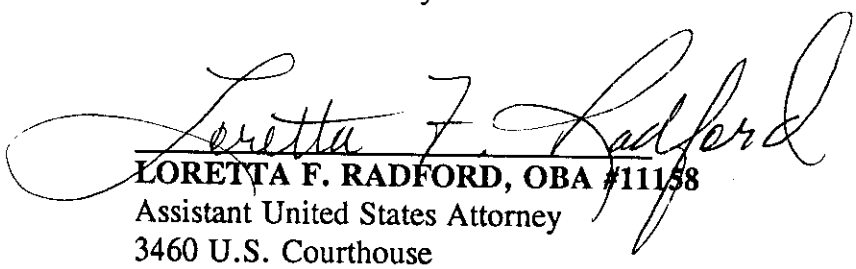
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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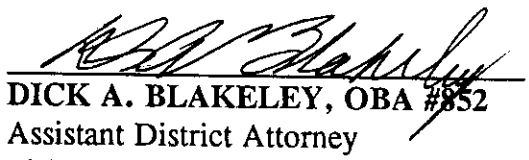

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Department of Human Services

Judgment of Foreclosure
Civil Action No. 95-C 244B

LFR:flv

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 14 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MELVIN E. EASILEY aka Melvin Easiley; DENISE L. EASILEY; CITY OF GLENPOOL, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE MAR 15 1996

Civil Case No. 95-C 437B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 14 day of March, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, MELVIN E. EASILEY aka Melvin Easiley, DENISE L. EASILEY, and CITY OF GLENPOOL, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, MELVIN E. EASILEY aka Melvin Easiley, was served with process a copy of Summons and Complaint on December 27, 1995; that the Defendant, DENISE L. EASILEY, was served a copy of Summons and Complaint on September 2, 1995, by Certified Mail; that

the Defendant, CITY OF GLENPOOL, Oklahoma, was served of Summons and Complaint on May 16, 1995, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on June 9, 1995; and that the Defendants, MELVIN E. EASILEY aka Melvin Easiley, DENISE L. EASILEY and CITY OF GLENPOOL, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, MELVIN E. EASILEY, is one and the same person named as "Melvin E." in a Certain Warranty Deed, dated July 1, 1989, and recorded on July 5, 1989, in Book 5192, Page 2243, in the records of Tulsa County, Oklahoma, and will hereinafter be referred to as "MELVIN E. EASILEY." The Defendants, MELVIN E. EASILEY and DENISE L. EASILEY, are husband and wife.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT TWENTY-EIGHT (28), BLOCK NINE (9), OF "LOTS 1-7 OF BLOCK 2, LOTS 6-20 OF BLOCK 3, LOTS 4-19 OF BLOCK 4, LOTS 6-20 OF BLOCK 5, AND ALL BLOCKS 6 THROUGH 19 KENDALWOOD IV ADDITION" TO THE CITY OF GLENPOOL, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on September 30, 1987, Ernest R. Cuellar and Juanita Cuellar, executed and delivered to OAK TREE MORTGAGE CORPORATION, their

mortgage note in the amount of $77,901.00, payable in monthly installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, Ernest R. Cuellar and Juanita Cuellar, husband and wife, executed and delivered to OAK TREE MORTGAGE CORPORATION, a mortgage dated September 30, 1987, covering the above-described property. Said mortgage was recorded on October 2, 1987, in Book 5055, Page 1895, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 26, 1991, OAK TREE MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to The United States Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on July 29, 1991, in Book 5338, Page 415, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 1, 1989, Ernest R. And Juanita Cuellar (husband and wife) granted a general warranty deed to Melvin E. And Denise L. Easiley (husband and wife). This Deed was recorded with the Tulsa County Clerk on July 5, 1989, in Book 5192 at Page 2243, and the Defendants, MELVIN E. EASILEY and DENISE L. EASILEY, assumed thereafter payment of the amount due pursuant to the note and mortgage described above, and are the current assumptors of the subject indebtedness.

The Court further finds that on September 1, 1991, the Defendants, MELVIN E. EASILEY and DENISE L. EASILEY, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on September 1, 1992 and September 1, 1993.

The Court further finds that the Defendants, MELVIN E. EASILEY and DENISE L. EASILEY, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, MELVIN E. EASILEY and DENISE L. EASILEY, are indebted to the Plaintiff in the principal sum of $113,590.87, plus interest at the rate of 10 percent per annum from March 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $26.00 which became a lien on the property as of July 2, 1990. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, MELVIN E. EASILEY, DENISE L. EASILEY and CITY OF GLENPOOL, Oklahoma, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, MELVIN E. EASILEY and DENISE L. EASILEY, in the principal sum of $113,590.87, plus interest at the rate of 10 percent per annum from March 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $26.00, plus costs and interest, for personal property taxes for the year 1989, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, MELVIN E. EASILEY, DENISE L. EASILEY, CITY OF GLENPOOL, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, MELVIN E. EASILEY and DENISE L. EASILEY, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $26.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

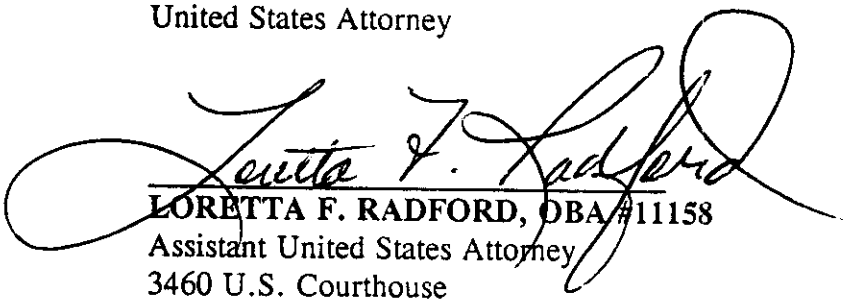
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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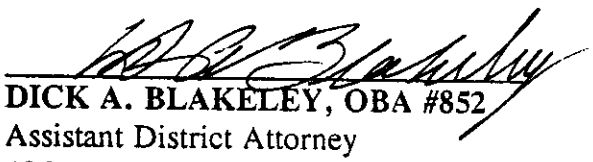

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County Treasurer and
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Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 437B

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 1 4 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LESLIE T. GILMORE; SHARZADA M. GILMORE; UNKNOWN SPOUSE OF Leslie T. Gilmore, if any; UNKNOWN SPOUSE OF Sharzada M. Gilmore, if any; STATE OF OKLAHOMA, ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE MAR 15 1996

Civil Case No. 95-C 381B

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that the Judgment of Foreclosure entered herein on the 17th day of October, 1995 and the Marshal Sale held on the 8th day of February, 1996, are vacated; the Hearing to Confirm Sale scheduled for the 20th day of March, 1996, at 10:30 a.m. is hereby canceled and this action is hereby dismissed without prejudice.

Dated this 14 day of March, 1996.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
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LFR:flv

ENTERED ON DOCKET
DATE 3-15-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHRIS LYNN TOWELL; DEANNA LYNN TOWELL; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

MAR 14 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 95-C 978H

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of March 14, 1996 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendants, **CHRIS LYNN TOWELL and DEANNA LYNN TOWELL**, against whom judgment for affirmative relief is sought in this action have failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, RICHARD M. LAWRENCE, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendants.

Dated at Tulsa, Oklahoma, this 14 day of March, 1996.

RICHARD M. LAWRENCE, Clerk
United States District Court for
the Northern District of Oklahoma

By L Adamski
Deputy

ENTERED ON DOCKET
DATE 3-15-96

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

In re:	)	
	)	
ASBESTOS LITIGATION.	)	M-1417
	)	ASB(I)-6748
	)	
KENNETH COWELL, individually and CHES COWELL, individually and as personal representative of the heirs of the estate of CHARLES E. COWELL.	)	No. 90-C-540-J

FILED
MAR 13 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

In accordance with N.D. LR 41, it is hereby ordered that the Clerk close this case. It may be reopened only upon application of either party and approval of the Court.

IT IS SO ORDERED.

Dated this 13 day of March 1996.

Sam A. Joyner
United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 13 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

MICHAEL D. MACK,

Petitioner,

v.

RON CHAMPION, et al.,

Respondent.

No. 95-C-356-B

ENTERED ON DOCKET
DATE MAR 14 1996

REPORT AND RECOMMENDATION

Petitioner, Michael D. Mack, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 21, 1995. Petitioner, currently confined in the Dick Conner Correctional Center at Hominy, challenges pro se his prior convictions in Case Nos. CRF-78-3188; CRF-79-1749, and CRF 86-992. By minute order dated April 21, 1995, the District Court referred the petition for further proceedings consistent with the Magistrate Judge's jurisdiction. On June 16, 1995, Respondent filed a Motion to Dismiss. For the reasons discussed below, the United States Magistrate Judge recommends that the Motion to Dismiss should be **DENIED**.

I. PROCEDURAL BACKGROUND

On September 15, 1994, Petitioner filed three Applications to Vacate Judgment and Sentence in the Tulsa County District Court. Petitioner requested that the court vacate the judgments and sentences of May 4, 1979 (Case No. CRF 78-3188)[1/], March 14, 1983 (Case No. CRF 79-1749)[2/], and May 27, 1986 (Case No.

1/ On May 4, 1979, in Case No. 78-3188, Petitioner pleaded guilty to the crime of Larceny of Merchandise from a Retailer. Petitioner was sentenced to eighteen months, and was committed to the (continued...)

CRF 78-1388)[3/], asserting that the trial court failed to advise Petitioner of his right to appeal or of his right to withdraw his guilty plea. By Order dated November 1, 1994, the Tulsa County District Court denied Petitioner's Applications.

Petitioner filed a Notice of Intent to Appeal the decision of the Tulsa County District Court on November 9, 1994. In his Petition of Error before the Oklahoma Court of Criminal Appeals, filed December 7, 1994, Petitioner alleged that the district court erred by failing to advise him of his right to counsel (for his direct appeal) or of his right to appeal. Petitioner's application for post-conviction relief was denied by the Oklahoma Court of Criminal Appeals on January 5, 1995 due to Petitioner's failure to timely appeal the decision of the district court.[4/]

In his Petition for a Writ of Habeas Corpus filed before this Court, Petitioner asserts the following errors: (1) double jeopardy, (2) denial of sixth and fourteenth constitutional rights due to failure of counsel to suppress or challenge the admission of his prior conviction, (3) ineffective assistance of counsel, and (4) failure of counsel to advise Petitioner of the effect of his prior guilty plea.

[1/] (...continued)
custody of the Department of Corrections.

[2/] On December 12, 1979, in Case No. CRF-79-1749, Petitioner was tried and convicted of Robbery with Firearm-After Conviction of a Felony. Petitioner was sentenced to sixty years, with the sentence to run consecutively with CRF-78-3188. After an appeal and subsequent remand, Petitioner, on March 14, 1983, in Case No. CRF-79-1749, pleaded guilty to the crime of Robbery With a Firearm, and was sentenced to seven years.

[3/] On May 27, 1986, Petitioner pled guilty to the Unlawful Possession of a Stolen Vehicle in Case No. CRF-86-992, and was sentenced to five years.

[4/] The court noted that Petitioner failed to comply with the court rules.

Respondents filed a Motion to Dismiss on June 16, 1995, requesting that the Court dismiss the Petition due to Petitioner's failure to exhaust all state remedies. In his Reply to the Motion to Dismiss, Petitioner acknowledges that he has not presented any of the issues raised in his Writ to the state trial or appellate courts. Petitioner nevertheless requests that this Court address the claims asserting that his failure to present the claims to the state court should be excused as futile.

II. ANALYSIS

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). "[E]xhaustion of state remedies is not required where the state's highest court has recently decided the precise legal issue that petitioner seeks to raise on his federal habeas petition." Goodwin v. State of Oklahoma, 923 F.2d 156, 157 (10th Cir. 1991). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

As a preliminary matter, a court must determine whether a Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455

U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by establishing that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal petition. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986).

Petitioner argues that he should not have to exhaust his state remedies because requiring him to return to state court would be futile. The Court liberally construes Petitioner as asserting that because Oklahoma state courts have consistently declined to review claims which were not raised on direct appeal or in a first post-conviction application, Petitioner's failure to exhaust his state remedies should be excused.

The futility exception is a narrow one, and is supportable "only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief." Duckworth v. Serrano, 454 U.S. 1, 3 (1981). The Tenth Circuit has stated that a "rigorously enforced" exhaustion policy is necessary to serve the end of protecting and promoting the state's role in resolving the constitutional issues raised in federal habeas petitions. Naranjo v. Ricketts, 696 F.2d 83, 87 (10th Cir. 1982).

However, in Harris v. Champion, 48 F.3d 1127 (10th Cir. 1995), the Tenth Circuit Court of Appeals noted that

> If a federal court that is faced with a mixed petition[5/] determines that the petitioner's unexhausted claims would now be procedurally barred in state court, "there is a procedural default for purposes of federal habeas." Therefore, instead of dismissing the entire petition, the court can deem the unexhausted claims procedurally barred and address the properly exhausted claims.

Id. at 1131 n.3 (citations omitted). The Tenth Circuit referenced the Supreme Court decision in Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991). The Coleman court observed that

> This rule [that a state court must articulate in its order its reliance on a procedural bar] does not apply if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims.

Coleman, 501 U.S. at 735 n.1. The majority opinion in Coleman, authored by Justice O'Connor, cites Harris v. Reed, 489 U.S. 255 (1988) (O'Connor, J., concurring). In Harris, Justice O'Connor noted that

> I do not read the Court's opinion as addressing or altering the well-settled rule that the lower federal courts, and this Court, may properly inquire into the availability of state remedies in determining whether claims presented in a petition for federal habeas corpus have been properly exhausted in the state courts. . . . [I]n determining whether

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[5/] The Harris court's focus was on "mixed petitions." In Rose v. Lundy, 455 U.S. 509, 522 (1982), the Supreme Court determined that a district court "must dismiss habeas petitions containing both unexhausted and exhausted claims." Although Petitioner has not filed a "mixed petition," the Court finds that this "distinction" is not important for the purpose of this motion. Regardless of whether a court dismisses a mixed petition or a petition containing only unexhausted state claims the result is the same becuse the petitioner must return to state court.

> a remedy for a particular constitutional claim is "available," the federal courts are authorized, indeed required, to asses the likelihood that a state court will accord the habeas petitioner a hearing on the merits of his claim.
>
> * * *
>
> [W]e have held that where a federal habeas petitioner raises a claim which has never been presented in any state forum, a federal court may properly determine whether the claim has been procedurally defaulted under state law, such that a remedy in state court is "unavailable" within the meaning of § 2254(c).
>
> * * *
>
> Moreover, dismissing such petitions for failure to exhaust state court remedies would often result in a game of judicial ping-pong between the state and federal courts, as the state prisoner returned to state court only to have the state procedural bar invoked against him.
>
> * * *
>
> In sum, it is simply impossible to "require a state court to be explicit in its reliance on a procedural default," where a claim raised on federal habeas has never been presented to the state courts at all. In such a context, federal courts quite properly look to, and apply, state procedural default rules in making the congressionally mandated determination whether adequate remedies are available in state court.

Id. at 268-270 (citations omitted).

Petitioner's claims were never presented in state court, and consequently, have not been "exhausted." However, if Petitioner's claims are procedurally barred under state law, the Court should deny Respondent's Motion to Dismiss and apply state procedural default rules in determining whether requiring Petitioner to exhaust his state remedies is futile.

Oklahoma has consistently declined to review claims which were not raised in the first request for post-conviction relief.

> All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

22 O.S. 1991, § 1086.

In this case, Petitioner did not directly appeal his convictions. In addition, Petitioner's first post-conviction application, which was denied by the trial court (and which the Oklahoma Court of Criminal Appeals refused to hear on procedural grounds) did not present any of the issues which Petitioner requests this Court to consider. If Petitioner chose to present his claims to the state court (or if the district court dismissed this Petition and required Petitioner to present his claims to the state district court), Petitioner's action would constitute his second post-conviction request for relief. Therefore, Petitioner has procedurally defaulted his claims, and requiring him to present his claims in state court would be futile. However, this Court may not consider the issues Petitioner raises unless Petitioner shows cause and prejudice for the default, or demonstrates that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 501 U.S. 722, 749-50.[6/]

[6/] The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. A petitioner is additionally required to establish prejudice, which requires showing "'actual prejudice' resulting from the errors of which he complains." United States v.

(continued...)

RECOMMENDATION

The United States Magistrate Judge recommends that the District Court **DENY** Respondent's Motion to Dismiss and order Petitioner to submit a supplemental brief explaining why each of the issues previously raised in his Petition for a Writ of Habeas Corpus meets the cause and prejudice standard, as discussed above. Respondent should be ordered to respond to all issues raised in the brief in support of Petition for a Writ of Habeas Corpus and in the supplemental brief, within thirty days of the filing of the supplemental brief. Petitioner should be required to file his reply within twenty days.

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of the receipt of this notice. **Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's order.** See Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 13 day of March 1996.

Sam A. Joyner
United States Magistrate Judge

[6/] (...continued)
Frady, 456 U.S. 152, 168 (1982). The alternative is proof of a "fundamental miscarriage of justice," which requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRISTOL RESOURCES CORPORATION,
an Oklahoma corporation,

Plaintiff,

vs.

ATLANTIC RICHFIELD COMPANY,
a Delaware corporation,

Defendant.

ENTERED ON DOCKET

DATE MAR 14 1996

Case No. 94-C-1117-K

FILED

MAR 13 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

STIPULATION OF
DISMISSAL WITH PREJUDICE

Pursuant to F.R.C.P. Rule 41(a), the parties hereby stipulate to the dismissal of this action with prejudice. The parties agree that they shall bear their own respective attorneys' fees and costs incurred in connection with this action.

GARDERE & WYNNE, L.L.P.

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Steven J. Adams, OBA #142
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of March, 1996, a true and correct copy of the above and foregoing instrument was mailed by U.S. Mail, with postage fully prepaid, to:

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Stephen R. Ward
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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. DONNA M. DURANT aka Donna Marie Durant; UNKNOWN SPOUSE OF Donna M. Durant aka Donna Marie Durant, if any; FLOYD DURANT; UNKNOWN SPOUSE OF Floyd Durant, if any; THE TULSA DEVELOPMENT AUTHORITY; FEDERAL HOME LOAN MORTGAGE CORPORATION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	ENTERED ON DOCKET DATE MAR 14 1996 **FILED** MAR 13 1996 Richard M. Lawrence, Clerk U. S. DISTRICT COURT Civil Case No. 95 C 251K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12 day of March, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, THE TULSA DEVELOPMENT AUTHORITY, appears by Darven L. Brown; the Defendant, FEDERAL HOME LOAN MORTGAGE CORP., appears not having previously filed a Disclaimer; and the Defendants, DONNA M. DURANT aka Donna Marie Durant, UNKNOWN SPOUSE OF Donna M.

Durant aka Donna Marie Durant, if any, FLOYD DURANT, and UNKNOWN SPOUSE OF Floyd Durant, if any, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, DONNA M. DURANT aka Donna Marie Durant, was served with process a copy of Summons and Complaint on October 7, 1995; that the Defendant, THE TULSA DEVELOPMENT AUTHORITY, was served a copy of Summons and Complaint on April 24, 1995, by Certified Mail; that the Defendant, FEDERAL HOME LOAN MORTGAGE CORP., signed a Waiver of Summons on March 31, 1995.

The Court further finds that the Defendants, UNKNOWN SPOUSE OF Donna M. Durant aka Donna Marie Durant, if any, FLOYD DURANT, and UNKNOWN SPOUSE OF Floyd Durant, if any, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning October 27, 1995, and continuing through December 1, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, UNKNOWN SPOUSE OF Donna M. Durant aka Donna Marie Durant, if any, FLOYD DURANT and UNKNOWN SPOUSE OF Floyd Durant, if any, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, UNKNOWN SPOUSE

OF Donna M. Durant aka Donna Marie Durant, if any, FLOYD DURANT and UNKNOWN SPOUSE OF Floyd Durant, if any. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on March 30, 1995; that the Defendant, THE TULSA DEVELOPMENT AUTHORITY, filed its Answer and Cross-Claim on May 25, 1995; that the Defendant, FEDERAL HOME LOAN MORTGAGE CORP., filed its Disclaimer on April 12, 1995; and that the Defendants, DONNA M. DURANT aka Donna Marie Durant, UNKNOWN SPOUSE OF Donna M. Durant aka Donna Marie Durant, if any, FLOYD DURANT, UNKNOWN SPOUSE OF Floyd Durant, if any, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, DONNA M. DURANT, is one and the same person as Donna Marie Durant, and will hereinafter be referred to as "DONNA M.

DURANT." The Defendants, FLOYD DURANT and DONNA M. DURANT, were granted a Divorce in Case No. JFD-78-2251, filed in Tulsa County District Court on April 10, 1979.

The Court further finds that on January 18, 1983, FLOYD DURANT and DONNA MARIE DURANT, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 83-B-51. On September 8, 1983, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor, and the case was subsequently closed on December 21, 1983.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> ***Lot Eight (8), Block Four (4), ROBINWOOD ADDITION, a subdivision to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.***

The Court further finds that on October 15, 1973, the Defendants, FLOYD DURANT and DONNA M. DURANT, executed and delivered to FIRST HOME MORTGAGE CORPORATION, their mortgage note in the amount of $12,000.00, payable in monthly installments, with interest thereon at the rate of Eight and One-Half percent (8½%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, FLOYD DURANT and DONNA M. DURANT, then husband and wife, executed and delivered to FIRST HOME MORTGAGE CORPORATION, a mortgage dated October 15, 1973, covering the above-described property. Said mortgage was recorded on October 17, 1973, in Book 4092, Page 620, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 18, 1973, FIRST HOME MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to SOONER FEDERAL SAVINGS AND LOAN ASSOCIATION. This Assignment of Mortgage was recorded on October 18, 1973, in Book 4092, Page 923, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 7, 1973, SOONER FEDERAL SAVINGS AND LOAN ASSOCIATION formerly HOME FEDERAL SAVINGS AND LOAN ASSOCIATION, assigned the above-described mortgage note and mortgage to FEDERAL HOME LOAN MORTGAGE CORP. This Assignment of Mortgage was recorded on January 21, 1974, in Book 4103, Page 1736, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 14, 1989, Maxim Mortgage Corporation, having acquired title by merger with Sooner Federal Savings and Loan Association, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C. This Assignment of Mortgage was recorded on June 16, 1989, in Book 5189, Page 1177, in the records of Tulsa County, Oklahoma. A Corrected Assignment was recorded on September 28, 1989, in Book 5210, Page 694, in the records of Tulsa County, Oklahoma to show how title was acquired.

The Court further finds that on December 18, 1989, the Defendant, DONNA M. DURANT, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on June 13, 1990, July 19, 1991, May 6, 1992, and May 17, 1993.

The Court further finds that the Defendants, DONNA M. DURANT and FLOYD DURANT, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, DONNA M. DURANT and FLOYD DURANT, are indebted to the Plaintiff in the principal sum of $13,895.70, plus interest at the rate of 8½ percent per annum from January 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $3.00 which became a lien on the property as of June 20, 1991, a lien in the amount of $22.00 which became a lien on the property as of June 26, 1992, a lien in the amount of $10.00 which became a lien on the property as of June 25, 1993, and a lien in the amount of $10.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, THE TULSA DEVELOPMENT AUTHORITY, has a lien on the property which is the subject matter of this action by virtue of a second Real Estate Mortgage, in the amount of $11,375.00 with accrued interest at the judgment rate from and after March 20, 1995, together with a reasonable attorney's fee in the sum of $1,706.25, which became a lien on the property as of September 13, 1988. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, DONNA M. DURANT, UNKNOWN SPOUSE OF Donna M. Durant, if any, FLOYD DURANT, UNKNOWN

SPOUSE OF Floyd Durant, if any, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, FEDERAL HOME LOAN MORTGAGE CORP., Disclaims any right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, DONNA M. DURANT and FLOYD DURANT, in the principal sum of $13,895.70, plus interest at the rate of 8½ percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $45.00, plus costs and interest, for personal property taxes for the years 1990, 1991, 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, THE TULSA DEVELOPMENT AUTHORITY, have and recover judgment in the amount of $11,375.00, with accrued interest at the judgment rate from and after March 20, 1995, together with a reasonable attorney's fee in the sum of $1,706.25, for its second Real Estate Mortgage, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, DONNA M. DURANT, UNKNOWN SPOUSE OF Donna M. Durant, if any, FLOYD DURANT, UNKNOWN SPOUSE OF Floyd Durant, if any, FEDERAL HOME LOAN MORTGAGE CORP., and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, DONNA M. DURANT and FLOYD DURANT, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, THE TULSA DEVELOPMENT AUTHORITY, in the amount of $11,375.00, with accrued interest at the judgment rate from and after March 20, 1995, together with a reasonable attorney's fee of $1,706.25, second real estate mortgage.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $45.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

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United States Attorney

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Attorney for Defendant,
The Tulsa Development Authority

Judgment of Foreclosure
Civil Action No. 95 C 251K

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D
MAR 1 3 1996
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

STRICKLAND TOWER MAINTENANCE, INC.,

Plaintiff,

v.

AT&T COMMUNICATIONS, INC.,

Defendant and
Counterclaimant,

v.

STRICKLAND TOWER MAINTENANCE, INC.,

Counterclaim Defendant.

Case No. 94-C-1015-H

ENTERED ON DOCKET
DATE 3-14-96

JUDGMENT

This action came on for consideration before the Court, the Honorable Sven Erik Holmes, United States District Judge, presiding, and the issues having been duly heard, and a decision having been duly rendered in favor of Plaintiff Strickland Tower Maintenance, Inc. in the amount of $643,394.00 and against Defendant AT&T Communications, Inc. On Defendant/ Counterclaimant AT&T Communications, Inc.'s counterclaim, judgment is entered on behalf of Counterclaim Defendant Strickland Tower Maintenance, Inc. and against Defendant/Counterclaimant AT&T Communications, Inc.

IT IS SO ORDERED.

This 13th day of March, 1996.

Sven Erik Holmes
United States District Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 3-14-96

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARLIN LEE ENGLIND aka Marlin L. Englind; CYNTHIA KAY ENGLIND; UNKNOWN SPOUSE OF Marlin Lee Englind aka Marlin L. Englind, if any; UNKNOWN SPOUSE OF Cynthia Kay Englind, if any; THE TULSA DEVELOPMENT AUTHORITY; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

F I L E D
MAR 12 1996
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 95-C 244B

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of March 12, 1996 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendants, **Marlin Lee Englind aka Marlin L. Englind, Cynthia Kay Englind, Unknown Spouse of Marlin Lee Englind aka Marlin L. Englind, if any, Unknown Spouse of Cynthia Kay Englind, if any, and The Tulsa Development Authority**, against whom judgment for affirmative relief is sought in this action have failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, RICHARD M. LAWRENCE, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendants.

Dated at Tulsa, Oklahoma, this 12 day of March, 1996.

RICHARD M. LAWRENCE, Clerk
United States District Court for
the Northern District of Oklahoma
by Mark C. McCartt Acting Clerk

By L. Adamski
Deputy

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CATHEY L. EASTMAN; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; FORD MOTOR CREDIT; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET
DATE MAR 13 1996

FILED

MAR 12 1996

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 95 C 1026K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12 day of March, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, FORD MOTOR CREDIT, appears by William L. Nixon, Jr.; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; and the Defendant, CATHEY L. EASTMAN, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, CATHEY L. EASTMAN, signed a Waiver of Summons on November 10, 1995; that the Defendant, FORD MOTOR CREDIT, signed a Waiver of Summons on October 19, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on October 25, 1995; that the Defendant, FORD MOTOR CREDIT, filed its Answer on November 3, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on November 13, 1995; and that the Defendant, CATHEY L. EASTMAN, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, CATHEY L. EASTMAN, is a single unmarried person.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT EIGHTEEN (18), BLOCK (5), AMENDED GOLF ESTATES II, AN ADDITION IN THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT NO. 4356.

The Court further finds that on October 25, 1989, the Defendant, CATHEY L. EASTMAN, executed and delivered to INLAND MORTGAGE CORPORATION, her mortgage note in the amount of $66,535.00, payable in monthly installments, with interest thereon at the rate of 8.435 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, CATHEY L. EASTMAN, a Single Person, executed and delivered to INLAND MORTGAGE CORPORATION, a mortgage dated October 25, 1989, covering the

above-described property. Said mortgage was recorded on October 26, 1989, in Book 5216, Page 99, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 25, 1989, INLAND MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to GOVERNMENT NATIONAL MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on May 10, 1993, in Book 5501, Page 400, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 6, 1993, GOVERNMENT NATIONAL MORTGAGE ASSOCIATION by: Midfirst Bank State Savings Bank by: its Attorney in Fact, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington D.C., his successor and assigns. This Assignment of Mortgage was recorded on May 10, 1993, in Book 5501, Page 401, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 7, 1993, the Defendant, CATHEY L. EASTMAN, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on September 28, 1993.

The Court further finds that the Defendant, CATHEY L. EASTMAN, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, CATHEY L. EASTMAN, is indebted to the Plaintiff in the principal sum of $75,600.18, plus interest at the

rate of 8.435 percent per annum from February 9, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $67.00 which became a lien on the property as of June 25, 1993, and a lien in the amount of $67.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state income taxes in the amount of $29,673.04, plus accrued and accruing interest which became a lien on the property as of May 4, 1994 and a lien in the amount of $158.51, plus accrued and accruing interest, which became a lien on the property as of June 22, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, FORD MOTOR CREDIT, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of $5,481.73 which became a lien on the property as of August 31, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CATHEY L. EASTMAN, is in default, and has no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, CATHEY L. EASTMAN, in the principal sum of $75,600.18, plus interest at the rate of 8.435 percent per annum from February 9, 1995 until judgment, plus interest thereafter at the current legal rate of 6.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $134.00, plus costs and interest, for personal property taxes for the years 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of $29,831.55, plus accrued and accruing interest, for state income taxes, plus costs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, FORD MOTOR CREDIT, have and recover judgment in the amount of $5,481.73 for its judgment lien, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, CATHEY L. EASTMAN and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, CATHEY L. EASTMAN, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $67.00,

personal property taxes which are currently due and owing.

Fourth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $29,831.55, plus accrued and accruing interest, for state income taxes.

Fifth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $67.00, personal property taxes which are currently due and owing.

Sixth:

In payment of Defendant, FORD MOTOR CREDIT, in the amount of $5,481.73, for its judgment.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and

decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

Loretta F. Radford

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Judgment of Foreclosure
Civil Action No. 95 C 1026K

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 12 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WALTER F. OWENS aka WALTER FERRIL aka WALTER OWENS; LESLIE OWENS aka LESLIE D. OWENS; TERRY GARTSIDE INVESTMENTS, INC.; DBG COMPANY, INC.; DANDI CONSTRUCTION CO., INC.; CITY OF SAND SPRINGS, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95-C 698BU

ENTERED ON DOCKET

DATE MAR 13 1996

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that the Judgment of Foreclosure entered herein on the 18th day of October, 1995, is vacated and the action is hereby dismissed without prejudice.

Dated this 12 day of March, 1996.

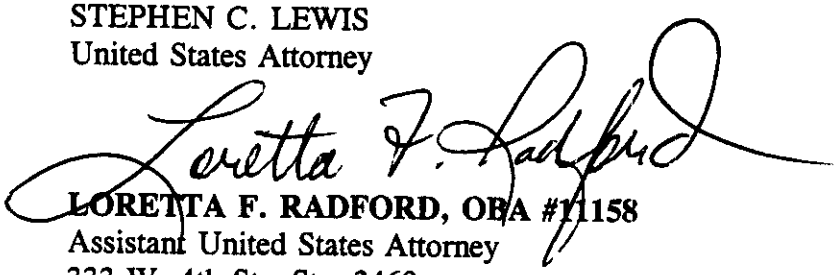
s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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LFR/lg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE MAR 13 1996

PETER J. MCMAHON,

Plaintiff,

vs.

STANLEY GLANZ,

Defendant.

No. 94-C-1198-K

FILED
MAR 12 1996
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

ORDER

In December 1994, Plaintiff, a federal pretrial detainee at the Tulsa County Jail (TCJ), brought this pro se civil rights action, pursuant to 42 U.S.C. § 1983, against Stanley Glanz, Sheriff of Tulsa County. He alleges as follows:

(1) the TCJ's policy prohibiting the purchase of newspapers, magazines and books infringed on his first amendment right.

(2) the following conditions at the TCJ amounted to punishment: (a) Plaintiff slept on a mattress on the floor near a toilet which smelled of human waste; (b) the table in the cell was too small to accommodate all inmates during meals; (c) cockroaches sometimes crawled on Plaintiff's bed and then on him; (d) clean sheets and towels were provided only "whenever" and razors only once each week; (e) violence in the cells was out of control and Plaintiff was indirectly punished by the use of pepper gas on other inmates; and (f) the TCJ did not have an evacuation plan in the event of a fire.

(3) Plaintiff did not have a television (TV) and a telephone at all times while in cell "N-8," was denied direct access to the law library at all times, and was punished when he was transferred to cell C-1-9 which had lost its TV because of an unruly inmate.

(4) Defendant monitored all of Plaintiff's telephone calls placed from the collect-call-only telephones in the cells.

Defendant has filed a motion to dismiss or, in the alternative, for summary judgment on the basis of the Court ordered Martinez Report. Plaintiff has objected.

I. UNDISPUTED FACTS

1. Plaintiff was booked in the TCJ on November 25, 1994, on state charges. On December 9, 1994, the U.S. Marshal Service

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placed a detainer preventing Plaintiff from posting a bond on the state charges. Plaintiff was detained in the TCJ until his transfer to a federal penitentiary in September 1995.

2. On November 27, 1994, Plaintiff was placed in the "N-tank" on the eighth floor where he remained until January 9, 1995, when he was transferred to cell C-1-9 on the ninth floor. At the time of Plaintiff's incarceration, the "N-Tank" had no TV and a "roll-a-round telephone" was provided on a as needed basis.

3. After incarceration, prison officials denied Plaintiff's request to receive the local newspaper through the mail.

4. On January 26, 1995, the Tulsa County Sheriff's Office modified its policy of excluding all newspapers and magazines and began permitting inmates to purchase soft-bound, non-pornographic, and non-pictorial magazines, books and papers from legitimate publishers or bookstores.

5. Plaintiff received only five of the seven weekly issues of the Tulsa World for the first several weeks due to a misunderstanding between the mail room and other officials.

6. EMTEC sprays the eighth and ninth floors of the TCJ for insects on a weekly basis. The spraying is done after the evening meal. The exterminator is not permitted to enter the cells as the inmates are on maximum security lock-down for the night.

7. Access to the law library is through a "slip system," or exact-cite paging system, which permits inmates to submit a list of up to five materials or cites and receive a copy of those materials at no charge. Inmates are not permitted to browse through the library at anytime.

8. The TCJ currently permits the use of Oleoresin Capsicum Spray (O.C. spray) when necessary to protect its property, control unruly or uncooperative inmates from physical harm, and to put down riots. Some of the residual effect of O.C. Spray may come into contact with innocent inmates nearby.

9. Plaintiff did not request medical treatment following the indirect contacts with O.C. spray while at the TCJ.

10. The Tulsa County Sheriff's Office currently records all

telephone calls placed from the cell telephones as a precaution in case of violence or threats to witnesses or victims. All telephones installed in the cells state that "all calls may be recorded." The tape recordings are kept for sixty days and reviewed only when a situation warrants it. Three free, unrecorded telephone calls are provided to each inmate after booking and one after each court appearance.

II. SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Applied Genetics, 912 F.2d at 1241 (citing Celotex Corp v. Catrett, 477 U.S. 317, 324 (1986)).

III. ANALYSIS

A. Restriction on Access to Publications

Defendant contends the temporary denial of access to newspapers from November 25, 1994, until January 26, 1995 (when Defendant implemented the new policy), is not sufficient to violate Plaintiff's constitutional rights. This Court agrees. It is only a prolonged deprivation which amounts to such a violation. Cf. Hause v. Vaught, 993 F.2d 1079, 1083 (4th Cir. 1993) (denial of outside information was minimal where Plaintiff's three periods of confinement were quite brief), cert. denied, 114 S.Ct. 702 (1994).

Nor do Plaintiff's contentions that he was not informed of the change in policy until February 26, 1995, and that he received only five of the seven issues ordered for the first couple of weeks amount to a constitutional violation. (Complaint, ex. 1 and 2.) These allegations assert at most negligent conduct which is not cognizable under 42 U.S.C. § 1983. See Williams v. Meese, 926 F.2d 994, 998 (10th Cir. 1991).[1] Accordingly, Defendant is entitled to judgment as a matter of law on Plaintiff's first claim of relief.

B. Conditions of Confinement

The treatment a detainee receives in jail and the conditions under which he is confined are subject to constitutional scrutiny under the Fourteenth Amendment. See Bell v. Wolfish, 441 U.S. 520, 535 (1979). A detainee may not be subject to conditions which amount to punishment or otherwise violate the constitution. Id. at 537. Conditions which are intended as punitive or are not reasonably related to a legitimate governmental interest violate a detainee's due process rights. Id. at 538-39.

Plaintiff alleges that he was (1) housed in an overcrowded cell; (2) forced to sleep and eat on a mattress on the floor; (3) denied a clean uniform, towel, and sheets for two to three weeks at a time; (4) refused a razor except for once a week; (5) housed on the eighth and ninth floors of the TCJ without an evacuation plan in case of fire, and (5) subjected to violence.

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[1] Plaintiff lacks standing to challenge the term "non-pictorial magazine" and the denial of hard-bound books even if he had alleged these claims in his complaint. Plaintiff has not alleged that Defendant or any other prison official ever refused to deliver to him pictorial magazines or hard-bound books. The question of harm or "injury in fact" is a preliminary inquiry in every case or controversy filed in federal court. Standing to sue is premised upon a personalized injury to a legally cognizable interest of the plaintiff. See e.g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Warth v. Seldin, 422 U.S. 490, 499 (1975); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 218 (1974).

The Court cannot become involved in the minor details of running the county jail. Daily decisions concerning detainees are best left to those entrusted with their confinement. Only where constitutional abuse is apparent should the Court interfere with the administrative functioning of the jail. It is fundamental that loss of liberty and freedom of choice occur during lawful incarceration. Correction officials cannot accommodate the precise needs of every inmate. Consequently, some level of discomfort is inherent in any incarceration, and as long as that discomfort does not amount to punishment it does not violate a detainee's constitutional rights.

None of Plaintiff's complained of conditions, either alone or in totality, amount to punishment. While prison overcrowding may violate the Constitution where it is so egregious that it endangers the safety of inmates, Plaintiff has failed to show that the crowded condition at the TCJ caused him any physical injury.[2] Nor has Plaintiff alleged or shown that he was the victim of any violence while at the TCJ or that jail personnel acted with reckless disregard to his safety. See Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988) (to be entitled to judgment on a failure to protect claim, a plaintiff must show a causal relationship between his or her injury and the deliberate actions of the defendant prison official).[3] Moreover, the undisputed summary

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[2] 18 U.S.C. § 3626(a)(1) provides as follows:
A Federal court shall not hold prison or jail crowding unconstitutional under the eighth amendment except to the extent that an individual plaintiff inmate proves that the crowding causes the infliction of cruel and unusual punishment of that inmate.

[3] Pretrial detainees and inmates have a right to be reasonably protected from threats of violence and attacks by other inmates. See Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981). Deliberate indifference on the part of corrections officials to inmate safety and the probability of violent attacks violates a convicted prisoner's Eighth Amendment rights. Berry v. City of Muskogee, 900 F.2d 1489, 1494-95 (10th Cir. 1990). Detainees retain at least the constitutional protections of convicted prisoners. Bell v.

judgment evidence shows that the Tulsa County Jail has fire alarms and a definite plan to evacuate inmates and deputies in a safe manner in case of fire.

The mere fact that Plaintiff was forced to sleep on a mattress on the floor during part of his incarceration, does not amount to punishment. The Constitution is indifferent as to whether the mattress a detainee sleeps on is on the floor or on a bed absent some aggravating circumstances. See Mann v. Smith, 796 F.2d 79, 85 (5th Cir. 1986); Castillo v. Bowles, 687 F.Supp. 277, 281 (N.D. Tex. 1988). Moreover, incarceration in a cell which smelled of urine and which had some cockroaches did not amount to punishment. See McBride v. Illinois Dept. Of Corrections, 677 F.Supp. 537, 539 (N.D.Ill. 1987); Bradford v. Gardner, 578 F.Supp. 382 (E.D. Tenn. 1984) (had no constitutional right to be incarcerated in a cell which does not smell of urine). Similarly, Plaintiff has not shown that he was harmed as a result of being required to wear the same clothing and use the same sheets and towels for more than one week due to prison overcrowding. See Young v. Ballis, 762 F.Supp. 823, 831 (S.D. Ind. 1990).

Lastly, Plaintiff argues Defendant indirectly punished him by the use of pepper gas on other inmates. He argues prison officials knew the pepper gas would travel through the air and air vents and that other inmates would be affected by its use. While wanton or deliberate infliction of injury on bystanders like Plaintiff could amount to a constitutional violation, the Court finds that there remain no genuine issues of material fact that Plaintiff did not suffer any injury as a result of the indirect breathing of pepper gas. The Special Report reveals that Plaintiff did not request medical care following the incidents at issue and simple discomfort does not amount to a constitutional violation. In any event, the Court finds Plaintiff has not established that Defendant intended

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Wolfish, 441 U.S. 520, 545 (1979). Therefore, if an official's conduct amounts to deliberate indifference, a detainee's Fourteenth Amendment Due Process rights would also be violated.

to harm him.

Accordingly, Defendant is entitled to judgment as a matter of law on Plaintiff's condition of confinement claims.

C. Assignment to Cell "N-8" and Denial of Equal Protection

In Count III of his amended complaint, Plaintiff challenges his assignment to cell "N-8" on the eighth floor of the TCJ, where he remained for approximately forty-five days until he was transferred to the ninth floor. He alleges that cell "N-8" was not a general population cell as it did not have a TV and a telephone twenty-four hours a day as most cells on the ninth floor. The Special Report reveals that Cell "N-8" was a smaller general population cell that was not equipped with a telephone and TV due to limited resources. A "roll-a-round phone," however, was available to inmates in "N-8" on a as needed basis. Plaintiff has no constitutional right to be incarcerated in a particular cell or facility, and his placement in cell "N-8" on the eighth floor of the TCJ, in and of itself, does not implicate a constitutional right of the Plaintiff. See Olim v. Wakinekona, 461 U.S. 238, 245 (1983); Meachum v. Fano, 427 U.S. 215, 224 (1976); Moody v. Dagget, 429 U.S. 78, 88 n.9 (1976). Thus, any expectation Plaintiff may have had in being assigned to a cell on the ninth floor is too insubstantial to rise to the level of due process protection. See Meachum, 427 U.S. at 228; Kincaid v. Duckworth, 689 F.2d 702, 704 (7th Cir. 1982), cert. denied, 461 U.S. 946 (1983); see also Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991) (because an inmate has no right to confinement in a particular institution, "[h]e cannot complain of deprivation of his 'right' in violation of due process").[4]

Nor did Defendant violate Plaintiff's equal protection rights

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[4] Additionally, federal courts do not interfere in classification and placement decisions. Such decisions are entrusted to prison administrators, not to the federal courts. Moody, 429 U.S. at 88 n.9; Meachum, 427 U.S. at 228; Wilkerson v. Maggio, 703 F.2d 909, 911 (5th Cir. 1983).

in denying him a TV and providing him a telephone a few hours a day while in cell "N-8." Despite the importance of televisions and telephones in modern society, Plaintiff does not have a fundamental right to in-cell TV and telephone. More v. Farrier, 984 F.2d 269, 271 (8th Cir. 1993) (citing City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 441-43 (1985)), cert. denied, 114 S.Ct. 74 (1993). Therefore, the Court reviews Plaintiff's equal protection claim under a rational basis standard. Under this standard Plaintiff prevails only if (1) he is similarly situated with inmates who are treated differently by the Tulsa County Sheriff's Department, and (2) the Tulsa County Sheriff's Department has no rational basis for the dissimilar treatment. See Moreland v. United States, 968 F.2d 655, 660 (8th Cir.) (en banc), cert. denied, 506 U.S. 1028 (1992); Buckley Const., Inc. v. Shawnee Civic & Cultural Development Authority, 933 F.2d 853 (10th Cir. 1991).

Although Plaintiff is similarly situated with other general population detainees who have in-cell TVs and telephones, the Court finds that the state action at issue in this case "bears a rational relationship to a state objective not prohibited by the Constitution." More v. Farrier, 984 F.2d 269, 271 (8th Cir.), cert. denied, 114 S.Ct. 74 (1993).

> Not all government-created inequalities are forbidden by the Constitution. `The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.'

Id. The Court cannot say that Sheriff Glanz crossed that line in this case by allocating the limited number of TVs and telephones to the larger cells with a higher number of inmates.

Sheriff Glanz is entitled to prioritize the problems presented by overcrowding. On the basis of the Special Report, Defendant may rationally decide that installing TVs and telephones in the larger cells would help prison officials in maintaining order and better handle overcrowding. Therefore, this case does not rise to the level of invidious discrimination proscribed by the Equal Protection Clause, See Briscoe v. Kusper, 435 F.2d 1046, 1052 (7th Cir. 1970) (the "Equal Protection Clause has long be limited to

instances of purposeful or invidious discrimination rather than erroneous or even arbitrary administration of state powers"), and the Court must defer to the judgment of the prison officials.

D. Denial of Access to the Courts and the Law Library

Next, Plaintiff alleges that Defendant interfered with his constitutional right of access to the courts and the law library. He contends that the "slip system," also known as exact-cite paging system, is impractical; responses to requests for legal materials take far too long, are often incorrect, or not filled at all. Unless an inmate knows a specific citation, the librarian will not look it up. Plaintiff further alleges that shepardizing is unavailable.[5]

A pretrial detainee, just like a convicted inmate, has a constitutional right to adequate, effective, and meaningful access to the courts and the law library. Love v. Summit County, 776 F.2d 908, 912 (10th Cir. 1985), cert. denied, 479 U.S. 814 (1986).

> The right is one of the privileges and immunities accorded citizens under article four of the Constitution and the Fourteenth Amendment. It is also one aspect of the First Amendment right to petition the government to redress grievances. Finally the right of access is founded on the due process clause and guarantees the right to present to a court of law allegations concerning the violation of constitutional rights.

Smith v. Maschner, 899 F.2d 940, 947 (10th Cir. 1990) (citation omitted).

In Bounds v. Smith, 430 U.S. 817, 827 (1977), the Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from

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5 In December 1994, Plaintiff alleges he gave a stamped envelope to prison official addressed to the U.S. Court Clerk, but this envelope never reached the Court Clerk's office. Plaintiff also alleges he did not have access to a library to do research to file pleadings challenging a federal detainer.

persons trained in the law." The state bears the burden to provide meaningful access and to demonstrate that its method is adequate. Gluth v. Kangas, 951 F.2d 1504, 1508 (9th Cir. 1991). The Tenth Circuit Court of Appeals has recognized that this right extends to inmates in county jails as well as state prisons. Beville v. Ednie, 74 F.3d 210, 212 (10th Cir. 1996).

Relying on Ruark v. Solano, 928 F.2d 947 (10th Cir. 1991), Defendant contends Plaintiff has failed to state a claim for recovery because he suffered no injurious consequences stemming from the County's denial of direct access to a law library. He contends Plaintiff has continued to be a prolific writer. Defendant misreads Ruark. While Ruark "recognized past decisions holding that absent `allegations of injurious consequences, [a] plaintiff presents no actionable claim,'" it found this rule inapplicable where there `is no showing of access to alternative legal resources.'" Beville, 74 F.3d at 212. Therefore, "where `the challenge is systemic, embracing the basic adequacy of materials and legal assistance made available to all or subgroups of the prison population . . . [or where] the conditions challenged obviously go to the heart of any meaningful access to libraries, counsel or courts" a prisoner need not show that the deprivation caused him an independent injury. Sowell v. Vose, 941 F.2d 32, 34 (1st Cir. 1991). In the case at hand, Plaintiff's complaint concerns the core requirement of adequate access to legal knowledge or assistance as opposed to ancillary issues, such as library schedules, provision of notary services, and the availability of supplies. Id.; see also Ruark, 928 F.2d at 950. Thus, Plaintiff need not show actual injury as a prerequisite to recovery.

Defendant's "slip system," however, may violate Plaintiff's constitutional right of access to a law library. Several courts have recognized that a paging system alone is unconstitutional because an inmate must request materials by exact cite. Toussaint v. McCarthy, 801 F.2d 1080, 1109-10 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987); Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978), cert. denied, 442 U.S. 911 (1979); Canell v. Bradshaw,

840 F.Supp. 1382, 1389-90 (D.Or. 1993); Casey v. Lewis, 834 F.Supp. 1553, 1566 (D. Ariz. 1992); Kaiser v. County of Sacramento, 780 F.Supp. 1309, 1316 (E.D. Cal. 1991).

In Toussaint, the Ninth Circuit accepted the prisoner's contention that a paging system that allowed a prisoner to order five books per week was constitutionally deficient:

> Simply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful chance to explore the legal remedies that he might have. Legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar adverse precedent. New theories may occur as a result of a chance discovery of an obscure or forgotten case. Certainly a prisoner, unversed in the law and the methods of legal research, will need more time or more assistance than the trained lawyer exploring his case. It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult.

Toussaint, 801 F.2d at 1109-10 (quoting Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978), cert. denied, 442 U.S. 911 (1979). See also Griffin v. Coughlin, 743 F.Supp. 1006, 1019-25 (N.D.N.Y. 1990) (paging system that allows two books a day is inadequate).

In the instant case, there remain genuine issues of material fact as to whether Plaintiff had access to digests or other basic reference material. In his affidavit (ex. A to response at 6), Plaintiff attests he submitted at least six requests for excerpts from the Oklahoma Digest and West's Modern or 4th Digest for topic on "prisons," but never received a reply or part of the order. There also remain genuine issues of fact as to whether Sheriff Deputy Sandy, the part-time librarian, had sufficient legal training to provide constitutionally sufficient access to the courts and the law library. In the absence of physical access to an adequate law library, Bounds requires "some degree of professional or quasi-professional legal assistance to prisoners." Bounds, 430 U.S. at 831. The Bounds court listed several alternatives to physical access including the training of inmates as paralegal assistants to work under lawyers' supervision, the use

of paraprofessionals and law students, volunteer attorneys, or staff attorneys working with prisoner legal assistance organizations. Id. See also Carper v. Deland, 54 F.3d 613, 616-17 (10th Cir. 1995) (legal services plan which provided private attorneys to assist inmates in preparation and filing of state or federal petitions for writs of habeas corpus and initial pleadings in civil rights actions regarding conditions of confinement of inmate in state facility or county jail, furnished constitutionally acceptable level of access to courts through legal assistance to inmates).

Accordingly, Defendant's motion for summary judgment must be denied as to Plaintiff's denial of access claim.

E. Punishment

In his Sixth Count, Plaintiff alleges that his transfer to cell C-1-9, which had been disciplined prior to his arrival by the removal of the TV, amounted to punishment in violation of his Fourteenth Amendment rights. As noted above, the denial of a TV does not amount to a constitutional violation. See Robinson v. Moses, 644 F.Supp. 975, 979 (N.D. Ind. 1986) (holding detainee in city-county lockup without TV facilities not violation of Fourteenth Amendment). In any event, Plaintiff has not demonstrated that the alleged deprivation caused a compensable injury. Accordingly, Defendants are entitled to judgment as a matter of law on this claim.

F. Electronic Monitoring of Telephone Conversations

Lastly, Plaintiff alleges that all calls made from the collect-call-only telephones in the cells are recorded, including all calls to his attorney and, thus, violate his constitutional rights.

It is now well settled that conversations of prison inmates may be "seized," despite the Fourth Amendment. Katz v. United States, 389 U.S. 347 (1967); Brown v. State, 349 So.2d 1196 (Fla. App. 1977) (prisoners have no reasonable expectation of privacy

regarding their conversations, and jail custodians may exercise constant surveillance, including eavesdropping, on their conversations), cert. denied, 434 U.S. 1078 (1978). The reason for this exception to what would otherwise be illegal eavesdropping is that prison officials need to be aware of escape plots and smuggling schemes as soon as possible in order to develop an appropriate and effective response. This is necessary for the security of the prisons.

Defendant contends he has no desire to invade the attorney-client communication privilege. However, in order to allow inmates in the jail reasonable access to telephones, while at the same time insuring the security to the jail, he has elected to record all telephone calls made from the collect-call-only telephones. The Court agrees this is the better solution. After all Plaintiff does not dispute he had access to a free, unrecorded telephone call to his lawyer after each court appearance and his lawyer could visit him at anytime. Moreover, Defendant submits that the recordings are not reviewed unless there is reason to believe the security of the jail is threatened, or that the telephones are being used to commit or facilitate the commission of a crime. Therefore the recording of all calls placed from the collect-call-only telephones in the cells, including calls to attorneys, did not violate Plaintiff's constitutional rights. Defendants are, thus, entitled to judgment as a matter of law.

IV. CONCLUSION

Defendant's motion to dismiss (docket #21-1) is DENIED and the motion for summary judgment (docket #21-2) is GRANTED as to all claims except for Plaintiff's claim of denial of access to the courts and the law library. Plaintiff's motion for partial summary judgment (docket #26) is DENIED. In light of this ruling, Plaintiff's motion to impose sanctions, to continue in order to pursue extended discovery, to compel and Defendant's motion for protective order (docket #36, #40, #44, #46) are DENIED. Plaintiff's motions for leave to supplement (docket #35 and #38)

are GRANTED.

SO ORDERED this 11 day of March 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE MAR 13 1996

JOSEPH ANGELO DICESARE,

Petitioner,

vs.

JACK COWLEY,

Respondent.

No. 95-C-475-K

FILED
MAR 12 1996
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

ORDER

This is a proceeding on a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner Joseph Angelo Dicesare, currently confined in the Oklahoma Department of Corrections, challenges his conviction for Larceny of a Domestic Animal in Craig County District Court, Case No. CRF-89-27. Respondent has filed a Rule 5 response to which Petitioner has replied. Also before the Court is Petitioner's motion for production of documents and subpoena duces tecum (docket #11). As more fully set out below the Court concludes that the petition and motion for production of documents should be denied.

I. BACKGROUND AND PROCEDURAL HISTORY

In October 1988, Cris Lundy, Petitioner's neighbor, discovered thirty-six head of cattle missing. Although Petitioner denied any knowledge of the missing cattle, a few days later Lundy located one of his black Brangus calves which had been "checked in" by Petitioner at the Vinita livestock auction. While the calf had no brand, tattoo or ear tag, Lundy had reason to believe this Brangus calf belonged to one of his cows. About a week later, Lundy brought that particular cow to the auction and placed the cow and calf in the same pen. The cow readily accepted the black calf, permitting it to nurse, which convinced Lundy the calf was one of those missing from his place. Then approximately a month later, Lundy found the fence between his acreage and Petitioner's property had been cut and tied with bailing wire.

The State initially charged Petitioner with larceny of Lundy's thirty-six head of cattle in Case No. CRF-88-81, but dismissed the case following a preliminary hearing. The State then filed a separate information alleging larceny of a single animal, Lundy's black calf. On May 18, 1989, Petitioner appeared at his preliminary hearing, demanding a thirty-day continuance because his newly retained counsel could not be present at the hearing.[1] The court denied the continuance and proceeded with the hearing. Petitioner at no time waived his counsel's presence. At the conclusion of the hearing, the trial court determined that an offense had been committed and that there was probable cause for charging Petitioner with the offense of larceny of a domestic animal. At his arraignment, Petitioner waived the presence of counsel, entered a plea of not guilty and requested a trial.

Six days before trial Petitioner's counsel filed a motion to remand for preliminary hearing, alleging Petitioner did not have the benefit of counsel at that proceeding. The trial judge conducted an evidentiary hearing shortly before the beginning of trial, and denied relief. The jury found Petitioner guilty and recommended a twenty-five year sentence. On December 1, 1989, the Court sentenced Petitioner in accordance with the jury verdict. On November 12, 1993, the Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction and sentence.

After exhausting his state remedies, Petitioner filed the instant petition for a writ of habeas corpus raising thirteen separate grounds for relief.

II. ANALYSIS

A. Absence of Counsel During Preliminary Hearing

In his first ground, Petitioner contends he was denied counsel at his preliminary hearing in violation of the Sixth Amendment.

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[1] At the preliminary hearing Petitioner testified that he fired his counsel the day before. The prosecutor then informed the court that Petitioner had used similar delay tactics in previous court appearances.

This claim stems from trial counsel's absence at the preliminary hearing and the trial court's refusal to grant a continuance.[2]

It is now well established that a preliminary hearing is a critical stage of a criminal proceeding at which a defendant is entitled to counsel. Coleman v. Alabama, 399 U.S. 1, 9-10 (1970). In Coleman, however, the Supreme Court recognized that the absence of counsel at a preliminary hearing will not void a conviction as long as the denial of counsel amounted to harmless error beyond a reasonable doubt under Chapman v. California, 386 U.S. 18 (1967).[3] Id. at 10. See also Hammonds v. Newsome, 816 F.2d 611, 613 (11th Cir. 1987) (per curiam) (holding that harmless error analysis is appropriate in considering the constitutional effect of the denial of counsel at preliminary hearing); Thomas v. Kemp, 796 F.2d 1322, 1327 (11th Cir. 1986) (same), cert. denied, 497 U.S. 996 (1986); Takacs v. Engle, 768 F.2d 122, 124 (6th Cir. 1985) (same); Moses v. Helgemoe, 562 F.2d 62, 63-64 (1st Cir. 1976) (same). But see Cleek v. State, 748 P.2d 39 (Okla. Crim. App. 1987) (denial of court-appointed counsel to indigent at preliminary hearing, absent valid waiver, violates a constitutional fundamental right not subject to the "harmless error" doctrine). The prosecution bears the burden of proving that even if constitutional error was established as a result of denial of counsel at preliminary hearing, the error was harmless. Thomas, 796 F.2d at 1326.

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[2] In his tenth ground Petitioner contends the prosecutor perjured himself during the preliminary hearing when he said Petitioner had used similar delay tactics--i.e., firing retained counsel the day before a preliminary hearing--in previous court appearances. In his eleventh ground Petitioner contends the trial court abused its discretion in failing to grant a continuance. Even if these claims were not procedurally barred, they are not cognizable in this habeas action.

[3] In Brecht v. Abrahmson, 507 U.S. 619, ___, 113 S.Ct. 1710 (1993), the Supreme Court held that the Chapman harmless error standard no longer applies to trial errors in federal habeas corpus cases. The absence of counsel at the preliminary hearing was not a trial error as it did not "`occur during the presentation of the case to the jury.'" Id. at 1712. Therefore, the harmless error standard set out in Brecht is inapplicable.

From a review of the record in this case, the Court finds that the absence of counsel at the preliminary hearing, if error, did not affect Defendant's trial. The sole purpose of a preliminary hearing in Oklahoma is to determine probable cause, not guilt. Kennedy v. State, 839 P.2d 667, 670 (Okla. Crim. App. 1992). Moreover, Petitioner does not argue that the absence of counsel at the preliminary hearing affected the outcome of his state trial. He does not allege he said anything of an incriminatory nature or that anything which transpired at the preliminary hearing was used against him at trial, or that he was otherwise prejudiced. Rather, Petitioner argues that because the preliminary hearing was a critical stage to which the right to counsel attached, he is entitled to habeas relief regardless of prejudice. Petitioner fails to recognize the harmless error principle enunciated in Coleman. Therefore, the absence of counsel at the preliminary hearing did not prejudice Petitioner and as such amounted to nothing more than "harmless error."[4]

B. Sufficiency of the Evidence

In his second ground, Petitioner contends there was insufficient evidence to sustain a conviction for larceny of a domestic animal. Sufficient evidence exists to support a conviction if any rational trier would accept the evidence as establishing each essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). In reviewing a sufficiency claim, the court must not weigh conflicting evidence or consider witness credibility. United States v. Davis, 965 F.2d 804, 811 (10th Cir. 1992), cert. denied, 507 U.S. 910 (1993). Instead the Court must view the evidence in the light most favorable to the prosecution, Jackson, 443 U.S. at

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[4] In his twelfth ground, Petitioner contends the trial court lacked jurisdiction to proceed with the trial because Petitioner did not knowingly and willfully elect to proceed pro se at the preliminary hearing. The Court finds this issue moot in light of the above ruling.

319, and "accept the jury's resolution of the evidence as long as it is within the bounds of reason." Grubb v. Hannigan, 982 F.2d 1483, 1487 (10th Cir.1993).

Although the Court must apply a federal constitutional standard to determine whether the State presented sufficient evidence, the Court must look to Oklahoma law for the elements the state must prove to convict Petitioner. The essential elements of larceny of a domestic animal are trespassory taking and carrying away of a domestic animal of another with intent to convert the same to his own use. Lasater v. State, 734 P.2d 317, 318 (Okla. Crim. App. 1987). Petitioner contends the State failed to present any evidence that he took Lundy's black calf with intent to steal.[5]

While the State presented no direct evidence, the Court finds the State presented sufficient circumstantial evidence from which a rational trier of fact could have concluded that Petitioner took the calf with the intent to steal. "It is well established that a criminal case may be proved circumstantially, and reasonable inferences drawn therefrom have the same probative effect as direct testimony." Shepard v. State, 756 P.2d 597, 599 (Okla. Crim. App. 1988). "[I]t is not necessary that there be any eye witness to the actual theft, or a witness who can place the defendant at the scene of the crime." Box v. State, 505 P.2d 995, 997 (Okla. Crim. App. 1973).

The circumstantial evidence in this case included a stolen calf found at the stockyards and sold by Petitioner. Testimony was offered to show that Steve Cabe, a cattle hauler, picked up five head of cattle, including the stolen calf, at Petitioner's request from his place of business and hauled them to the livestock auction. Petitioner was named as the owner on the ticket and never

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[5] Petitioner did not challenge the "taking" element on direct appeal. That claim is, therefore, procedurally barred unless Petitioner shows cause and prejudice, or a fundamental miscarriage of justice. For purposes of the above discussion, the Court presumes Petitioner can establish sufficient cause and prejudice to excuse his procedural default.

returned the money he received for the calf even after it was established that it belonged to Lundy. See Shepard, 756 P.2d at 599. Approximately one month after the cattle disappeared, Lundy found the fence between his acreage and Petitioner's property cut and tied back with bailing wire.

In spite of the above circumstantial evidence, Petitioner relies on Tate v. State, 706 P.2d 169, 171 (Okla. Crim. App. 1985), for the proposition that "[w]hen a defendant is shown to be honestly mistaken as to having ownership rights in the property alleged to be stolen, a larceny conviction is not sustainable." In Tate, however, the owners of the allegedly stolen steers did not act in good faith. They overgrazed their pastures, thus, causing their cattle to break through fences of other people's pastures. Upon noticing that some of their cattle had escaped to Tate's property, the owners neither notified Tate nor attempted to retrieve their cattle for over three months. Tate, on the other hand, did not attempt to conceal his action. He had at least five people helping him gather the cattle to transport to the auction; the cattle were sold on the open market; and Tate returned the money he received for the allegedly stolen cattle.

Based on the evidence presented at Petitioner's trial, the Court finds that a reasonable jury could find the evidence sufficient to conclude that Petitioner took Mr. Lundy's calf with intent to steal. Therefore, the writ will not issue for lack of sufficiency of the evidence.

C. Prosecutorial Misconduct

In grounds three and four, Petitioner contends the prosecutor improperly injected into his closing argument other crimes evidence, improperly commented on Petitioner's failure to rebut the State's evidence that somebody cut the fence, and erred in stating that Petitioner had pled guilty to the information.

In analyzing "whether a petitioner is entitled to federal habeas relief for prosecutorial misconduct, [a federal habeas court] must determine whether there was a violation of the criminal

defendant's federal constitutional rights which so infected the trial with unfairness as to make the resulting conviction a denial of due process." Fero v. Kerby, 39 F.3d 1462, 1473 (10th Cir. 1994) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)), cert. denied, 115 S.Ct. 2278 (1995); see also Coleman v. Saffle, 869 F.2d 1377, 1395 (10th Cir. 1989), cert. denied, 494 U.S. 1090 (1990). The factors considered in this due process analysis are: (1) the strength of the state's case; (2) whether the judge gave curative instructions regarding the misconduct; and, (3) the probable effect of the conduct on the jury's deliberative process. Hopkinson v. Shillinger, 866 F.2d 1185, 1210 (10th Cir. 1989), cert. denied, 497 U.S. 1010 (1990).

The first instance of alleged misconduct occurred when the prosecutor made the following statement in closing argument: "An honest mistake folks? Chris Lundy lost 30 head. He didn't lose just one. He lost 30 head of cattle." This comment drew a contemporaneous objection by defense counsel which the trial court sustained. The trial court then instructed the jury to disregard the comment.

On direct appeal, the Court of Criminal Appeals found as follows:

> Standing alone, this argument has appeared to be a naked violation of the trial court's granting of a motion in limine and later sustaining of objection to references to other missing cattle. However, it is clear that any prejudicial effect of the State's argument was minimized when considered in context. In his first argument the prosecutor said: "I believe he [Lundy] said thirty some head of cattle disappeared . . . But we're only involved in this cow, this heifer. . ." Defendant's counsel responded in part: "...There's an inference that other cattle were stolen. So what?. . . If there were other cattle stolen that were found in Pryor or Skiatook or whatever, that has nothing to do with this case. . . There's such a thing as an honest mistake... This led to the prosecutor's response "An honest mistake, folks..." quoted above. Appellant says in his brief "the bell could not be unrung." But in this case defendant's counsel, at least, played the first tune. In any event, Judge Clanton effectively muted any discordant tones. No prejudice resulted from this exchange.

Unpublished opinion, at 9-10.

This Court agrees that no prejudice resulted from the first instance of alleged prosecutorial misconduct. Most recently in Woodruff v. State, 846 P.2d 1124 (Okla. Crim. App.), cert. denied, 114 S.Ct. 349 (1993), the Oklahoma Court of Criminal Appeals found that comments made by a prosecutor during closing argument which were objected to and sustained, were cured of their prejudicial effect by the court's ruling. In any event, the Court finds that in the context of the entire trial, the prosecutor's comments did not render the trial fundamentally unfair.

The second instance of alleged misconduct involved the following comments: "The truth is somebody cut the fence. And there was no denial on the part of the defendant that somebody cut the fence. Never denied it." Trial counsel immediately voiced an objection, requesting the trial court to admonish the jury that the defendant had no obligation "to deny anything in this trial today." The trial court sustained the objection and admonished the jury to disregard the prosecutor's comments. The prosecutor then clarified his remarks as follows:

> PROSECUTOR: Your Honor, ladies and gentleman of the jury, I was not referring to the defendant in that. There were other witnesses the defendant called on his behalf and none of those witnesses called in his behalf denied that fence hadn't been cut. And I wasn't talking about the defendant himself because he didn't testify. And you cannot consider against him the fact that he did not get up and testify.

(Trial tr. At 123-24.)

In light of counsel's prompt objection and the trial court's instruction, the Court finds Defendant was not prejudiced by the prosecutor's comments about no denial "on the part of the defendant."

The third instance of prosecutorial misconduct involves nothing more than an oversight. After reading the information, the prosecutor stated: "To this information the defendant has entered a plea of guilty." (Trial. tr. At 61.) The prosecutor then proceeded with his opening argument. Defense counsel did not

notice the oversight in time to voice an objection. Prior to deliberation, however, the trial court instructed the jury that Petitioner had pled not guilty and was presumed innocent.

The Court finds the prosecutor's mistatement could not have had any effect on the jury's deliberation especially in view of the trial court's instruction that Plaintiff had pled not guilty and was presumed innocent. Accordingly, Petitioner is not entitled to habeas relief as a result of prosecutorial misconduct.

D. Information

In his fifth ground, Petitioner challenges the information on state ground. He argues the information was defective because improper procedure was followed in dismissing Case No. CRF-88-81 where Petitioner had been charged with larceny of thirty-six head of cattle.

Even if the information charging Petitioner with larceny of a domestic animal was defective, Petitioner would not be entitled to habeas relief. The sufficiency of an indictment or information is not a matter for federal habeas relief unless the information is so deficient that the convicting court lacked jurisdiction. Heath v. Jones, 863 F.2d 815 (11th Cir. 1989); Uresti v. Lynaugh, 821 F.2d 1099 (5th Cir. 1987). Under the Sixth and Fourteenth Amendments, Petitioner is entitled to fair notice of the criminal charges against him, and claims of due process violations in not providing such fair notice are cognizable in a habeas corpus action. See Hunter v. State of N.M., 916 F.2d 595, 598 (10th Cir. 1990), cert. denied, 500 U.S. 909 (1991); Franklin v. White, 803 F.2d 416 (8th Cir. 1986), cert. denied, 481 U.S. 1020 (1987).

In the instant case, the Court finds no such constitutional error in the charge for Larceny of a Domestic Animal. The information adequately established the state court's jurisdiction and sufficiently informed Petitioner of the offense. Petitioner's contention that the information was defective because the state court failed to follow state procedure in dismissing Case No. CRF-88-81 is not cognizable in this habeas action. See Pulley v.

Harris, 465 U.S. 37, 41-42 (1984) (alleged violations of state law are not cognizable in a federal habeas corpus proceedings). Therefore, Petitioner is not entitled to relief on this ground.

E. Ineffective Assistance of Appellate Counsel

Next Petitioner challenges the assistance of his appellate counsel. He contends counsel was ineffective for failing to raise on direct appeal the ineffective assistance of his trial counsel.[6]

To prove ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, id. at 694. Although the Strickland test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is used with respect to appellate counsel. See, e.g., Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992), cert. denied, 113 S. Ct. 2347 (1993).

In attempting to demonstrate that appellate counsel's failure to raise a state claim constitutes deficient performance, it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument that could be made. See Jones v. Barnes, 463 U.S. 745, 754 (1983). A petitioner, however, may establish constitutionally inadequate performance if he shows that

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[6] The Court will not address Petitioner's contentions that appellate counsel failed to file a reply brief and a petition for rehearing as these filings were not mandatory. Similarly the Court will not address counsel's failure to raise on direct appeal ground ten, eleven and twelve as these issues are nothing more than a restatement of issues in grounds one and five. Lastly, the Court will not address Petitioner's contention in ground thirteen that the prosecutor walked into the courtroom where the jury was deliberating. This unsubstantiated assertion, without more, is insufficient to sustain a claim of ineffective assistance of appellate counsel.

counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker.

> When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986); Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987) (ineffective assistance of counsel when appellate counsel ignored "a substantial, meritorious Fifth Amendment issue" raising instead a weak issue").

At the outset the Court notes that Petitioner's claims of ineffective assistance of trial counsel are nothing more than a restatement of grounds two, three and four. Even liberally construing Petitioner's claims, the Court finds them meritless and, as a result, appellate counsel's decision not to present them on direct appeal did not amount to ineffective assistance under the Sixth Amendment.

Petitioner contends his trial counsel was ineffective in the constitutional sense when he failed to appear at the preliminary hearing. In support of this proposition, Petitioner cites Strickland v. Washington, 466 U.S. 648 (1984). The Strickland test, however, "is inappropriate where the issue is the denial of the assistance of counsel, rather than a claim that counsel who was present was ineffective." Green v. Arn, 809 F.2d 1257, 1262 (6th Cir. 1987), judgement vacated on other grounds, 839 F.2d 300 (1988). Therefore, the Court need not analyze the absence of Petitioner's counsel under Strickland. Nor does the Court need to review the related contention that if counsel had been present he could have objected to the information, sought a continuance, and filed a motion to quash information.

Next Petitioner contends his trial counsel failed to object to

the prosecutor's opening statement that defendant had pled guilty to the information. As noted above, this error was nothing more than an oversight by the prosecutor and was corrected by the trial court through its jury instructions. Therefore, defense counsel's failure to object did not amount to ineffective assistance of counsel. Similarly, any objection by defense counsel to the word "cattle" or "cows" would have been much too broad. Counsel chose instead to file a motion in limine barring any reference to the fact that other cattle were stolen. Lastly, counsel was not ineffective for failing to request jury instructions on knowingly concealing stolen property because such crime is not a lesser included offense of larceny of a domestic animal. See Bussett v. State, 646 P.2d 1293 (Okla. Crim. App. 1982).

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that Petitioner is not in custody in violation of the Constitution or laws of the United States. Accordingly, the petition for a writ of habeas corpus (docket #1) and Petitioner's motion for production of documents (docket #11) are hereby **denied.**

SO ORDERED THIS 11 day of March, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CATHEY L. EASTMAN; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; FORD MOTOR CREDIT; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET
DATE MAR 13 1996

FILED
MAR 12 1996
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

Civil Case No. 95 C 1026K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12 day of March, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, FORD MOTOR CREDIT, appears by William L. Nixon, Jr.; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; and the Defendant, CATHEY L. EASTMAN, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, CATHEY L. EASTMAN, signed a Waiver of Summons on November 10, 1995; that the Defendant, FORD MOTOR CREDIT, signed a Waiver of Summons on October 19, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on October 25, 1995; that the Defendant, FORD MOTOR CREDIT, filed its Answer on November 3, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on November 13, 1995; and that the Defendant, CATHEY L. EASTMAN, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, CATHEY L. EASTMAN, is a single unmarried person.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT EIGHTEEN (18), BLOCK (5), AMENDED GOLF ESTATES II, AN ADDITION IN THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT NO. 4356.

The Court further finds that on October 25, 1989, the Defendant, CATHEY L. EASTMAN, executed and delivered to INLAND MORTGAGE CORPORATION, her mortgage note in the amount of $66,535.00, payable in monthly installments, with interest thereon at the rate of 8.435 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, CATHEY L. EASTMAN, a Single Person, executed and delivered to INLAND MORTGAGE CORPORATION, a mortgage dated October 25, 1989, covering the

above-described property. Said mortgage was recorded on October 26, 1989, in Book 5216, Page 99, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 25, 1989, INLAND MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to GOVERNMENT NATIONAL MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on May 10, 1993, in Book 5501, Page 400, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 6, 1993, GOVERNMENT NATIONAL MORTGAGE ASSOCIATION by: Midfirst Bank State Savings Bank by: its Attorney in Fact, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington D.C., his successor and assigns. This Assignment of Mortgage was recorded on May 10, 1993, in Book 5501, Page 401, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 7, 1993, the Defendant, CATHEY L. EASTMAN, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on September 28, 1993.

The Court further finds that the Defendant, CATHEY L. EASTMAN, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, CATHEY L. EASTMAN, is indebted to the Plaintiff in the principal sum of $75,600.18, plus interest at the

rate of 8.435 percent per annum from February 9, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $67.00 which became a lien on the property as of June 25, 1993, and a lien in the amount of $67.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state income taxes in the amount of $29,673.04, plus accrued and accruing interest which became a lien on the property as of May 4, 1994 and a lien in the amount of $158.51, plus accrued and accruing interest, which became a lien on the property as of June 22, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, FORD MOTOR CREDIT, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of $5,481.73 which became a lien on the property as of August 31, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CATHEY L. EASTMAN, is in default, and has no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, CATHEY L. EASTMAN, in the principal sum of $75,600.18, plus interest at the rate of 8.435 percent per annum from February 9, 1995 until judgment, plus interest thereafter at the current legal rate of 5.26 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $134.00, plus costs and interest, for personal property taxes for the years 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of $29,831.55, plus accrued and accruing interest, for state income taxes, plus costs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, FORD MOTOR CREDIT, have and recover judgment in the amount of $5,481.73 for its judgment lien, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, CATHEY L. EASTMAN and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, CATHEY L. EASTMAN, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $67.00,

personal property taxes which are currently due and owing.

Fourth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $29,831.55, plus accrued and accruing interest, for state income taxes.

Fifth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $67.00, personal property taxes which are currently due and owing.

Sixth:

In payment of Defendant, FORD MOTOR CREDIT, in the amount of $5,481.73, for its judgment.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and

decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

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Judgment of Foreclosure
Civil Action No. 95 C 1026K

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN K. KELLY,

Plaintiff,

vs.

AMERADA HESS CORPORATION,

Defendant.

No. 95-C-178-K

ENTERED ON DOCKET
DATE MAR 13 1996

FILED
MAR 12 1996
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the parties' motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendant and against the plaintiff.

ORDERED this 12 day of March, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE MAR 13 1996

JOHN K. KELLY,

Plaintiff,

vs.

AMERADA HESS CORPORATION,

Defendant.

No. 95-C-178-K

FILED
MAR 12 1996
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

ORDER

Before the Court are the motions of the parties for summary judgment. Plaintiff commenced this action in state court, alleging breach of contract on defendant's part. Defendant timely removed the action to this Court on the bases of (1) diversity of citizenship and (2) preemption under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1001 et seq.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

Plaintiff was employed by defendant as a supervisory senior

auditor. Defendant consolidated its U.S. Exploration & Production Operations in Houston, Texas and prepared to close its Tulsa office. Plaintiff received a letter dated March 16, 1994, from his superior, Mr. Bartzokas, outlining an offer to transfer and relocate to Houston. Alternatively, plaintiff was offered severance pay upon the establishment of a release date mutually agreed to by the plaintiff and defendant.

On April 6, 1994 plaintiff filled out a form declining the defendant's offer to transfer him to Houston. On the same day, he sent a letter to the department manager, Mr. Master, which stated in pertinent part:

> I resign the position of Supervising Senior Auditor and I am providing the corporation a two-week notice. My last day with the company will be April 20, 1994.
>
> . . . .
>
> I respectfully request that my release date with the company coincide with the date of April 20, 1994 whereby I will be entitled to receive severance pay and one week's additional severance pay for every two weeks of work from February 1, 1994.

Plaintiff characterizes this letter as one of "conditional acceptance" of defendant's offer, requiring only acceptance of the release date by defendant to become a binding contract. Plaintiff contends defendant's acceptance is evidenced by a notation made by Bartzokas on a copy of plaintiff's letter, sent back to Master, which stated: "Greg -- Release date is fine. As discussed, severance benefits do not apply to resignations." On June 27, 1994 plaintiff was sent a letter by Roger Flartey, Secretary of Amerada Hess, stating plaintiff was not eligible for severance benefits

because he had resigned. Flartey confirmed the decision in another letter to plaintiff dated August 11, 1994. Flartey sent plaintiff a third letter of explanation and denial on October 14, 1994.

In response, defendant points to Master's affidavit, which states that after the decision to close the Tulsa office was announced, Master verbally informed all internal audit employees, including plaintiff, they would be assigned an October 1, 1994 release date. Upon seeing Kelly's April letter, Master told Kelly his release date had to be the same as that assigned to all internal audit employees. Therefore, Kelly's request for an early release date could not be accommodated. Master faxed a copy of Kelly's letter to Bartzokas, and Master and Bartzokas discussed it. Master states, and Bartzokas confirms, that Bartzokas' notation "release date is fine" refers to the company decision establishing October 1, 1994 as the assigned date for all internal audit personnel. The faxed copy of the Kelly letter with Bartzokas' handwritten notation was not intended as a personal response to plaintiff. Finally, defendant notes Section 3.2 of the Employee Benefit Plan states an employee shall be disqualified for severance benefits if he fails to continue in the company's employ until the date actually set for the employee's termination.

It is axiomatic "[i]n order to have a valid contract, there must be mutual consent, a meeting of the minds." Hampton v. Surety Development Corp., 817 P.2d 1273, 1274 (Okla.1991). Plaintiff has failed to demonstrate such mutual consent in this case. Plaintiff, in a manner unclear, happened to see the Bartzokas notation on a

copy of plaintiff's letter. The notation was directed to Master, not plaintiff. Even if plaintiff's interpretation of the notation were correct, strongly denied by Bartzokas and virtually destroyed by the second sentence of the notation, the "acceptance" was not communicated to plaintiff in a way which would legally bind defendant. The breach of contract claim fails.

In the alternative, defendant argues its severance pay plan is an "employee welfare benefit plan" covered by ERISA. See, e.g., Holland v. Burlington Indus., Inc., 772 F.2d 1140 (4th Cir.1985). Defendant argues ERISA preemption applies.[1] This appears doubtful, as it is undisputed the defendant's plan did not take effect until after plaintiff's departure from defendant's employ. Assuming arguendo the new plan applied to plaintiff, the Court finds the "arbitrary and capricious" standard appropriate. See Rademacher v. Colo. Ass'n of Soil Cons. Med. Plan, 11 F.3d 1567, 1569 (10th Cir.1993). An interpretation is arbitrary and capricious if it is lacking in substantial evidence or contrary to law. An interpretation will be upheld under this standard if it is reasonable and made in good faith. Id. Plaintiff has failed to demonstrate a genuine issue of material fact as to whether defendant's interpretation was arbitrary and capricious. Any ERISA claim by plaintiff fails as well.

It is the Order of the Court that the motion of the plaintiff

---

[1]In response to this argument, plaintiff has recently filed a motion for leave to file amended complaint, adding an ERISA claim. The Court has considered the motions for summary judgment as if the motion to amend had been granted and an ERISA claim were also pending.

for summary judgment (#9) is hereby DENIED and the motion of the defendant for summary judgment (#21) is hereby GRANTED.

ORDERED this 12 day of March, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 12 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

RANDY LEE KEITH,)
)
Plaintiff,)
)
vs.) No. 96-CV-79-E
)
JIM LOWERY, and ALLEN AUTRY,)
)
Defendants.)

ENTERED ON DOCKET
DATE MAR 13 1996

ORDER

This matter comes before the Court on Plaintiff's motion for leave to proceed in forma pauperis. The Court now reviews Plaintiff's allegations and concludes this action should be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d).

In his pro se complaint, Plaintiff sues Jim Lowery, fire investigator, and Allen Autry, counsel. He alleges that he was held in the Tulsa County Jail from February 1, 1992, until October 22, 1992, in violation of the Speedy Trial Act. He further alleges that his attorney, Allen Autry, forced him to plead guilty or he would have received a thirty-year sentence. Plaintiff requests that his sentence be dismissed or expunged, that all records of his conviction be destroyed, and that the time served in the Tulsa County Jail be credited toward his sentence.

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts. Neitzke v. Williams, 490 U.S. 319, 324 (1989). 28 U.S.C. § 1915 permits an indigent litigant to commence a civil action without prepayment of fees or costs. See 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows an in

forma pauperis suit to be dismissed if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous under section 1915(d) if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327).

After liberally construing Plaintiff's pro se pleading, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action lacks an arguable basis in law as it is clear from the face of the complaint that Plaintiff's claims are barred by the two-year statute of limitations. See Fratus v. Deland, 49 F.3d 673, 674-75 (10th Cir. 1995) (district court may consider affirmative defense sua sponte only when the defense is "obvious from the face of the complaint" and "[n]o further factual record [is] required to be developed"); Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988) (the applicable statute of limitations for civil rights actions under Oklahoma law is the two-year limitations period for "an action for injury to the rights of another"). Plaintiff's action arose in February of 1992 when he was arrested for First Degree Arson. The State of Oklahoma has no tolling provision for civil lawsuits filed by prisoners. See Hardin v. Straub, 490 U.S. 536, 540 n.8 (1989).[1]

Accordingly, Plaintiff's motion for leave to proceed in forma

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[1] To the extent Plaintiff seeks to challenge his conviction on the basis of infective assistance of counsel and speedy trial violation, the Court notes he has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. See Case No. 96-CV-80-H.

pauperis (docket #2) is GRANTED and this civil rights action is hereby DISMISSED as frivolous pursuant to 28 U.S.C. § 1915(d). The Clerk shall mail to Plaintiff a copy of his complaint.

SO ORDERED this 12th day of March, 1996.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 12 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

HOMEWARD BOUND, INC., et. al.,	)	
Plaintiffs,	)	
vs.	)	Case No: 85-C-437-E
THE HISSOM MEMORIAL CENTER, et. al.,	)	ENTERED ON DOCKET
Defendants.	)	DATE MAR 13 1996

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on February 12, 1996 for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the application for fees, DHS' objections, and approves the Stipulation of the parties.

The Court hereby awards the firm Bullock & Bullock uncontested attorney fees in the amount of $43,168.75 and out of pocket expenses in the amount of $4,546.40.

IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority and the Department of Rehabilitation Services are each jointly and severally liable for the payment to Plaintifffs' counsel, Bullock & Bullock, for attorney fees in the amount of $43,168.75 plus expenses in the amount of

$4,546.40 and a judgment in the amount of $47,715.15 is hereby entered on this day.

The Court hearing on the contested fees in the amount of $1,335.40 will be held on 10 day of April, 1996 at 10 a.m.

ORDERED this 12 day of March, 1996.

S/ JAMES O. ELLISON

JAMES O. ELLISON
United States District Court

Louis W. Bullock
Patricia W. Bullock
BULLOCK & BULLOCK
320 South Boston, Suite 718
Tulsa, Oklahoma 74103-3783
(918) 584-2001

Frank Laski
Judith Gran
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
125 South Ninth Street, Suite 700
Philadelphia, Pennsylvania 19107
(215) 627-7100

ATTORNEYS FOR PLAINTIFFS

Mark Jones
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
4545 North Lincoln, Suite 260
Oklahoma City, OK 73105-3498
(405) 521-4274

Lynn S. Rambo-Jones
Deputy General Counsel
OKLAHOMA HEALTH CARE AUTHORITY
4545 N. Lincoln Blvd., Suite 124
Oklahoma City, Oklahoma 73105
(405) 530-3439

ATTORNEYS FOR DEFENDANTS

(ORDER32.FEE)

ENTERED ON DOCKET
DATE 3-13-96

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 12 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

DAVID B. McDERMOTT, II,

Plaintiff,

v.

ALLEN LITCHFIELD,

Defendant.

Case No. 95-C-307-H

ORDER

Before the Court for consideration is the Report and Recommendation of United States Magistrate Judge (Docket # 10)[1], Plaintiff's Objections to Magistrate's Recommendations (Docket # 11), Defendant's Response to Plaintiff's Objections (Docket # 12), Plaintiff's Reply to Defendant's Response (Docket # 13), Defendant's Supplemental Response to Plaintiff's Objectioins (Docket # 15), and "Ex Parte" Opposition to Defendant's Supplemental Response (Docket # 16).

When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

> [t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

The Report and Recommendation recommends the granting of Defendant's Motion to Dismiss, the granting of Defendant's Motion to Strike Plaintiff's Motion for Leave to file an

[1] The Report and Recommendation pertains to Defendant's Motion to Dismiss (Docket # 3), Plaintiff's Motion for Leave to File Amended Complaint (Docket # 6), Defendant's Motion to Strike Plaintiff's Motion for Leave to File an Amended Complaint (Docket # 7), and Defendant's Motion to Strike Plaintiff's Amended Complaint (Docket # 9).

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Amended Complaint, the granting of Defendant's Motion to Strike Plaintiff's Amended Complaint, and the denial of Plaintiff's Motion for Leave to File an Amended Complaint.

Based on a review of the Report and Recommendation of the Magistrate Judge and the Objections thereto, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge.

IT IS SO ORDERED.

This 12TH day of March, 1996.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 12 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 95-C-1232-K
OKLAHOMA CENTRAL CREDIT UNION CERTIFICATES OF DEPOSIT OF ROBERT M. VILLAGOMEZ, NOS. 485540-6, 485540-7, AND 485540-8, Defendants.	)	

ENTERED ON DOCKET
DATE 3-13-96

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of March 12, 1996, and the Declaration of Assistant United States Attorney Catherine Depew Hart, that all parties in interest, if any, to the following-described defendant properties, to-wit:

a) Oklahoma Central Credit Union Certificate of Deposit of Robert M. Villagomez No. 485540-6 in the amount of $4,237.59;

b) Oklahoma Central Credit Union Certificate of Deposit of Robert M. Villagomez No. 485540-7 in the amount of $22,189.16;

c) Oklahoma Central Credit Union Certificate of Deposit of Robert M. Villagomez No. 485540-8 in the amount of $1,868.36;

d) **The Sum of Sixteen Thousand Two Hundred Ninety-Two and 55/100 Dollars ($16,292.55) in Account No. 9109322363 at Bank of Oklahoma in the Name of Robert Villagomez or Carmen Villagomez,**

against which judgment for affirmative relief is sought in this action, have failed to plead or otherwise defend as to the defendant properties, as provided by the Federal Rules of Civil Procedure, except:

Robert M. Villagomez, who executed Stipulations for Forfeiture of the defendant properties on July 17, 1995, and October 25, 1995, respectively, both of which were filed in this action on December 19, 1995, at the time of filing the Complaint for Forfeiture In Rem.

I, RICHARD M. LAWRENCE, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter default as to the above-described defendant properties as to all persons and/or entities by virtue of their failure to file Claims to said defendant properties, except Robert M. Villagomez, whose Stipulations for Forfeiture are set forth above.

DATED at Tulsa, Oklahoma, this 12 day of March, 1996.

RICHARD M. LAWRENCE,
Clerk, U. S. District Court

By: L. Adamski

N:\UDD\CHOOK\FC\VGOMEZ1\05251

3-12-96

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 12 1996

Richard M. Lawrence, Court Clerk
DISTRICT COURT

BOBBY SMITH,

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant.

Case No. 94-CV-948-H

STIPULATION FOR DISMISSAL

COMES NOW THE Plaintiff and stipulates that the above styled and numbered case can be dismissed with prejudice (the case cannot be refiled). Each party is responsible for it attorney fees and costs.

Bobby D. Smith
BOBBY SMITH,
Plaintiff

JOHN W. YOUNG
OBA #9967
P.O. Box 1364
Sapulpa, OK 74067
(918) 224-3131
Attorney for Plaintiff

JUDGE HOLMES
JUDGE OF THE DISTRICT COURT

MARK T. STEELE
OBA # 14078
100 West Fifth Street
Tulsa, Oklahoma 74103
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 12 1996
Phil M. Lawrence, Court Clerk
DISTRICT COURT

PATRICE SULLIVAN,

Plaintiff,

v.

AMERADA HESS CORPORATION,

Defendant.

Case No. 94-C-1120K

ENTERED ON DOCKET
MAR 12 1996

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant, by and through their respective attorneys, hereby jointly inform the Court that Plaintiff's claims should be dismissed with prejudice, with each side to bear its own costs and attorneys' fees.

DATED this 29 day of February, 1996.

Respectfully submitted,

PATRICE SULLIVAN
Plaintiff

By: _____
Robert Butler, OBA#1380
Butler & Linger
1710 South Boston Avenue
Tulsa OK 74119

ATTORNEYS FOR PLAINTIFF

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

By: _____
J. Patrick Cremin, OBA #2013
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0594

ATTORNEYS FOR DEFENDANT

DKM-4218

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 11 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JAMES DAVID KIEHN,

Plaintiff,

v.

KEOTA PUBLIC SCHOOLS,

Defendant.

Case No. 96-C-0002B

ENTERED ON DOCKET
DATE MAR 12 1996

STIPULATION OF DISMISSAL
WITH PREJUDICE

Plaintiff James David Kiehn, who appears pro se, and Defendant Independent School District No. I-43, by and through counsel, hereby stipulate to the dismissal of this action with prejudice to its refiling; each party agrees to bear his or its own costs, expenses and attorney fees, all pursuant to Rule 41, Fed.R.Civ.P.

James David Kiehn
P.O. Box 60484
Oklahoma City, OK 73146

PLAINTIFF PRO SE

Timothy M. Melton, OBA #11928
The Center for Education Law, Inc.
809 N.W. 36th Street
Oklahoma City, Oklahoma 73118
(405) 528-2800

ATTORNEY FOR DEFENDANT

a:\pldgs.9\kiehn\stip.dis

FILED

MAR 11 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA J. ANDERSON, Plaintiff, v. CENTURY FINANCE COMPANY OF OKLAHOMA, INC., Defendants.	)	Case No. 95 C 1067 E

ENTERED ON DOCKET
MAR 12 1996

STIPULATION FOR DISMISSAL WITH PREJUDICE

COME NOW the parties, Linda J. Anderson and Century Finance Company of Oklahoma, Inc., and stipulate to a dismissal with prejudice of the Complaint, each party to bear its own costs.

Respectfully submitted,

By: Katherine T. Waller

KATHERINE T. WALLER
7666 East 61st Street, Suite 251
Tulsa, Oklahoma 74133

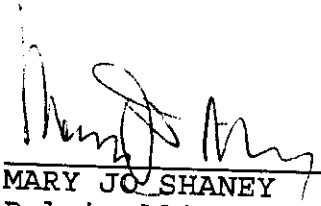
ATTORNEY FOR PLAINTIFF LINDA J. ANDERSON

and

By: Mort Welch

MORT WELCH
2601 NW Expressway, Suite 601
Oklahoma City, Oklahoma 73112

and

By: 

MARY JO SHANEY
Polsinelli, White, Vardeman
& Shalton
700 West 47th Street, Suite 1000
Kansas City, Missouri 64112

ATTORNEYS FOR DEFENDANT
CENTURY FINANCE COMPANY OF
OKLAHOMA, INC.

11127/26061
SSPLAZA2: V:\MJSHA\PLDG\55895.1

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 11 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

PERCY EDMUNDSON,)
)
Plaintiff,)
)
vs.) No. 96-C-104-H
)
LISA DEANN HIRN,)
)
Defendant.)

ENTERED ON DOCKET
DATE 3-12-96

ORDER

Plaintiff, a Tulsa county inmate, has filed with the Court a motion for leave to proceed in forma pauperis, pursuant to 28 U.S.C. § 1915, and a civil rights complaint, pursuant to 42 U.S.C. § 1983. He alleges Lisa DeAnn Hirn falsely accused him of auto theft. Plaintiff seeks $30,000 in damages.

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S.Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

Having liberally construed Plaintiff's pro se pleadings, see

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Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that this action lacks an arguable basis in law and should be dismissed sua sponte as frivolous. Plaintiff has not alleged a constitutional violation. Moreover, the conduct of Ms. Hirn does not constitute action under color of state law for purposes of a section 1983 violation. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970) (for a complaint under section 1983 to be sufficient a plaintiff must allege that defendant deprived him of a right secured by the Constitution and laws of the United States, and that defendant acted under color of law).

Accordingly, Plaintiff's motion for leave to proceed in forma pauperis (doc. #2) is **granted** and this action is hereby **dismissed** as frivolous pursuant to 28 U.S.C. § 1915(d). The Clerk shall **mail** a copy of the complaint to Plaintiff.

SO ORDERED THIS 8th day of March, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 11 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

RUSSELL WEIBLEY,)
)
Plaintiff,)
)
vs.) No. 96-C-0135-H
)
CREEK COUNTY DISTRICT COURT,)
)
Defendant.)

ENTERED ON DOCKET
DATE 3-12-96

ORDER

Plaintiff, a state prisoner, has filed a motion for leave to proceed in forma pauperis and a petition for a writ of mandamus pursuant to 28 U.S.C. § 1361. Plaintiff requests an order compelling the Creek County District Court to respond to his motions for temporary restraining order/preliminary injunction and for notary public, and petition for writ of habeas corpus submitted for filing on November 27, 1995.

Even if the Court liberally construes Petitioner's action as a one in the nature of mandamus,[1] the Court lacks subject matter jurisdiction to compel a state official from the Creek County District Court to perform a duty owed to Plaintiff. See 28 U.S.C. § 1361 (providing that federal court has jurisdiction to compel an

[1] The writ of mandamus has been abolished, see Fed. R. Civ. P. 81(b).

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officer or employee of the United States to perform a duty owed to plaintiff). Accordingly, Petitioner's action in the nature of mandamus is hereby **dismissed for lack of subject matter jurisdiction**. Petitioner's motion for leave to proceed in forma pauperis (docket #2) is **granted**.

IT IS SO ORDERED.

This 8TH day of MARCH 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 11 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

WILLIAM DAVID HAFF,

Plaintiff,

vs.

WASHINGTON COUNTY JAIL, MIKE SILVA, and CURTIS DELAP,

Defendants.

No. 95-C-1201-H

ENTERED ON DOCKET
DATE 3-12-96

ORDER

On January 8, 1996, the Court granted Plaintiff's motion for leave to proceed in forma pauperis as to Counts I and II and directed Plaintiff to complete summons and Marshal forms and return them to the Court within twenty days. Plaintiff has failed to comply with the above order.

Accordingly, this action is hereby DISMISSED WITHOUT PREJUDICE for lack of prosecution.

IT IS SO ORDERED.

This 8TH day of MARCH, 1996.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 11 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

SHIRLEY MANNING,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of the Social Security Administration,

Defendant.

Case No. 93-C-979-H

ENTERED ON DOCKET
DATE 3-12-96

JUDGMENT

This Court entered an order on February, 28 1996, adopting the Report and Recommendation of the United States Magistrate Judge, reversing the decision of the Secretary, and remanding this matter for the immediate award of benefits.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Plaintiff and against the Defendant.

IT IS SO ORDERED.

This 8TH day of March, 1996.

Sven Erik Holmes
United States District Judge

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FILED
MAR 11 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PAULA E. WILKERSON,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,

Defendant.

Case No. 93-C-1046-H

ENTERED ON DOCKET
DATE 3-12-96

JUDGMENT

This Court entered an order on February 28, 1996 adopting the Report and Recommendation of the United States Magistrate Judge and affirming the decision of the Secretary.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendant and against Plaintiff.

IT IS SO ORDERED.

This 8th day of March, 1996.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 3-12-96

CHRISTOPHER A. REDDING, an individual,

Plaintiff,

v.

TULSA COUNTY, ex rel; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF TULSA; JOHN DOE, JIM DOE, AND JOE DOE, three unknown Tulsa County Deputy Sheriffs or jail employees,

Defendants.

No. 95-C-173B

FILED
MAR 8 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

Now on this 8th day of March, 1996, this cause comes before the Court. The Court finds the Defendant has made to the Plaintiff, an offer to allow judgment to be taken against the Defendant in this cause for the sum of $35,000.00. The said sum of $35,000.00 includes all damages, costs, and attorney fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is rendered for the Plaintiff in the amount of $35,000.00 to include damages, costs and attorney fees, with interest thereon at the legal rate set by law not to exceed 10%.

SAM A. JOYNER
MAGISTRATE/JUDGE

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APPROVED:

F. Anthony Musgrave
Musgrave & Parker
5319 South Lewis, Suite 110
Tulsa, Oklahoma 74105
Attorney for Plaintiff

Fred H. DeMier
Assistant District Attorney
406 County Courthouse
Tulsa, Oklahoma 741034
Attorney for Defendant, Board of
County Commissioners of Tulsa County

ENTERED ON DOCKET
DATE 3-12-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SALLY FRAZIER fka Sally Haner; UNKNOWN SPOUSE OF Sally Frazier fka Sally Haner, if any; PAUL HANER; UNKNOWN SPOUSE OF Paul Haner, if any; STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES; COUNTY TREASURER, Rogers County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma,

Defendants.

FILED
MAR 11 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 95-C 795H

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 8TH day of MARCH, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, appear by Michele L. Schultz, Assistant District Attorney, Rogers County, Oklahoma; the Defendants, SALLY FRAZIER fka Sally Haner and UNKNOWN SPOUSE OF Sally Frazier fka Sally Haner, who is Clint Crites, appear not having previously filed a Disclaimer; and the Defendants, PAUL HANER, UNKNOWN SPOUSE OF Paul Haner, if any and STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, was served a copy of Summons and Complaint on August 21, 1995, by Certified Mail; that Defendant, COUNTY TREASURER, Rogers County, Oklahoma, was served a copy of Summons and Complaint on August 21, 1995, by Certified Mail; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, was served a copy of Summons and Complaint on August 21, 1995, by Certified Mail.

The Court further finds that the Defendants, PAUL HANER and UNKNOWN SPOUSE OF Paul Haner, if any, were served by publishing notice of this action in the Claremore Daily Times, a newspaper of general circulation in Rogers County, Oklahoma, once a week for six (6) consecutive weeks beginning December 13, 1995, and continuing through January 17, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, PAUL HANER and UNKNOWN SPOUSE OF Paul Haner, if any, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, PAUL HANER and UNKNOWN SPOUSE OF Paul Haner, if any. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds

that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, filed their Answer on September 1, 1995; that the Defendant, SALLY FRAZIER fka Sally Haner now Sally Crites, filed her Disclaimer on November 1, 1995; that the Defendant, UNKNOWN SPOUSE OF Sally Frazier fka Sally Haner now Sally Crites, who is Clint Crites, filed his Disclaimer on September 28, 1995; and that the Defendants, PAUL HANER, UNKNOWN SPOUSE OF Paul Haner, if any and STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, SALLY FRAZIER, is one and the same person formerly known as Sally Haner, and now known as Sally Crites, will hereinafter be referred to as "SALLY FRAZIER." The Defendants, SALLY FRAZIER and PAUL HANER, were granted a Divorce in Rogers County, Oklahoma on November 30, 1993, in Case No. D-93-393. The Defendant, UNKNOWN SPOUSE OF Sally Frazier, is found to be Clint Crites, and will hereinafter be referred to as "CLINT CRITES."

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

The West 845 feet of the North 458.5 feet of the NE¼ of NE¼ of Section 18, Township 23 North, Range 17 East of the I.B.& M., Rogers County, Oklahoma, according to the U.S. Government Survey thereof.

The Court further finds that on March 31, 1988, Denver L. Nimmo, executed and delivered to MIDFIRST MORTGAGE CO., his mortgage note in the amount of $36,226.00, payable in monthly installments, with interest thereon at the rate of Eight and Five-Eighths percent (8.625%) per annum.

The Court further finds that as security for the payment of the above-described note, Denver L. Nimmo, a single person, executed and delivered to MIDFIRST MORTGAGE CO., a mortgage dated March 31, 1988, covering the above-described property. Said mortgage was recorded on April 8, 1988, in Book 782, Page 306, in the records of Rogers County, Oklahoma.

The Court further finds that on March 31, 1988, MIDFIRST MORTGAGE CO., assigned the above-described mortgage note and mortgage to MIDFIRST SAVINGS AND LOAN ASSOCIATION. This Assignment of Mortgage was recorded on April 8, 1988, in Book 782, Page 312, in the records of Rogers County, Oklahoma.

The Court further finds that on August 27, 1991, MIDFIRST SAVINGS AND LOAN ASSOCIATION, assigned the above-described mortgage note and mortgage to THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C.,

his successors and assigns. This Assignment of Mortgage was recorded on August 30, 1991, in Book 861, Page 874, in the records of Rogers County, Oklahoma.

The Court further finds that Defendants, SALLY FRAZIER and PAUL HANER, currently hold title to the property by virtue of a General Warranty Deed, dated December 16, 1989, and recorded on December 20, 1989, in Book 821, Page 827, in the records of Rogers County, Oklahoma and are the current assumptors of the subject indebtedness.

The Court further finds that on August 1, 1991, the Defendants, SALLY FRAZIER and PAUL HANER, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between the Plaintiff and the Defendant, PAUL HANER, on February 28, 1992. A superseding agreement was make between the Plaintiff and the Defendant, SALLY FRAZIER, on September 30, 1992. A superseding agreement was reached between these same parties on September 30, 1993.

The Court further finds that the Defendants, SALLY FRAZIER and PAUL HANER, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, SALLY FRAZIER and PAUL HANER, are indebted to the Plaintiff in the principal sum of $45,884.60, plus interest at the rate of 8.625 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, PAUL HANER, UNKNOWN SPOUSE OF Paul Haner, if any and STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, SALLY FRAZIER and CLINT CRITES, Disclaim any right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, SALLY FRAZIER and PAUL HANER, in the principal sum of $45,884.60, plus interest at the rate of 8.625 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action in the amount, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, SALLY FRAZIER, CLINT CRITES, PAUL HANER, UNKNOWN SPOUSE

OF Paul Haner, if any, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, SALLY FRAZIER and PAUL HANER, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
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Claremore, OK 74017
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 795H

LFR:flv

ENTERED ON DOCKET
3-11-96

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 8 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

JOY S. ANDERSON,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,[1/]

Defendant.

No. 94-C-875-J

JUDGMENT

Defendant filed an Answer to Plaintiff's social security complaint on April 11, 1995. On November 7, 1995, this Court granted Defendant's Motion to Remand for further development of the record. Judgment for the Plaintiff and against the Defendant is hereby entered.

It is so ordered this 8 day of March 1996.

Sam A. Joyner
United States Magistrate Judge

[1/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action.

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR - 8 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTONIO YARBROUGH; VIRGIE MAE YARBROUGH; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE MAR 11 1996

Civil Case No. 95-C 312B

ORDER CONFIRMING SALE

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed February 21, 1996, in which the Magistrate Judge recommended that the Motion to Confirm Sale be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and is affirmed.

It is therefore **ORDERED** that the Motion to Confirm Sale is granted.

Dated this 8 day of March, 1996.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TERRY E. WARD; UNKNOWN SPOUSE OF TERRY E. WARD, IF ANY; LORI R. WARD aka LORI PERKINS; DAVID WAYNE PERKINS; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; SNOWCREST CONDOMINIUM ASSOCIATION, INC.; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,
Defendants.

FILED

MAR - 8 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 94-C 891B

ENTERED ON DOCKET

DATE MAR 11 1996

ORDER CONFIRMING SALE

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed February 21, 1996, in which the Magistrate Judge recommended that the Motion to Confirm Sale be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and is affirmed.

It is therefore **ORDERED** that the Motion to Confirm Sale is granted.

Dated this 8 day of March, 1996.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MASTERCRAFT CONSTRUCTION, INC.,

Plaintiff,

v.

SOUTHERN OAKS DEVELOPMENT PARTNERSHIP, DODSON AND ASSOCIATES, INC., BRUMBLE CONSTRUCTION CO., JAMES R. BEAVERS, and JIMMIE L. BEAVERS

Defendant.

FILED
MAR 8 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

No. 94-C-914-B

ENTERED ON DOCKET
DATE MAR 11 1996

ORDER

Mastercraft Construction, Inc., Appellant and debtor below, requested that the Bankruptcy Court order an accounting of certain partnership property, and order that the income or profits of 25% of the partnership be turned over to the bankruptcy estate. Following a two-day non-jury trial, the Bankruptcy Court determined that Appellant had breached fiduciary duties owed to the prospective partnership, and that Appellant's actions constituted fraud. The Court found that Appellant was not a valid member of the partnership and was not entitled to share in any partnership profits. Appellant appeals the decision of the Bankruptcy Court. For the reasons discussed below, the Bankruptcy Court's decision is **AFFIRMED**.

I. STATEMENT OF FACTS

In early 1988, Mr. Richard Dodson (principal of Dodson and Associates, Inc., hereafter "Dodson"), Mr. Danny Brumble (principal of Brumble Construction Co., Inc.,

hereafter "Brumble"), and Mr. Steve Ridenour (principal of Mastercraft Construction, Inc., hereafter "Ridenour") began exploring the possibility of developing a 40 acre tract in South Tulsa. The parties agreed that the 40 acres could support approximately 80 building lots for luxury homes with each lot priced between $60,000 and $80,000.

On May 2, 1988, Dodson signed a contract to purchase the 40 acres (on behalf of a "yet to be formed" partnership). The contract required $25,000 in earnest money which was paid in equal shares by Dodson, Brumble and Mastercraft.

The parties contacted First National Bank of Tulsa ("First Tulsa") to begin negotiations to obtain a loan to purchase and develop the property. The estimated amount of the loan was $3.1 million. The parties additionally hoped that the real estate would serve as collateral for the loan.

In early May 1988, First Tulsa informed the parties that they needed additional financial strength (an additional partner with money) for the loan, and that the deal would probably require a ten percent cash deposit (in addition to the property) as collateral.

The parties agreed to approach Mr. James Beavers ("Beavers") about participating in the deal. On May 11, 1988, at a meeting of the parties, Beavers agreed to become a partner. However, Beavers agreed to contribute only his proportional share of the venture, or 25%. The trial court found that the parties discussed and agreed (either expressly or by their silence) that each of the members of the proposed partnership would contribute his proportional share of any financial

requirements. At this meeting, Ridenour never mentioned that he might not have sufficient funds for a cash deposit.

On May 20, 1988, Dodson learned that First Tulsa would make the $3.1 million dollar loan only if $400,000 in certificates of deposit were deposited at First Tulsa and pledged on the loan. The parties decide to apply for the loan at Tulsa National Bank, hoping for better conditions.

The parties additionally obtained an extension on the initial real estate purchase contract. That contract was scheduled to expire by June 1, 1988. The extension was for an additional fourteen days, cost $25,000, and was paid for entirely by Dodson.

Tulsa National informed Dodson on July 13, 1988 that the loan application had been denied. Dodson contacted First Tulsa to determine whether First Tulsa would still agree to make the loan, with a closing date of June 15, 1988.

The loan officer at First Tulsa agreed to try to get the loan "re-started," and on June 14, 1988, First Tulsa agreed to make the loan, but with some additional conditions. The new terms of the loan required a cash deposit of $400,000 and $400,000 in mortgages on real estate, in addition to the property (the 40 acres), as collateral. Dodson contacted each of the parties and told them of the terms of the loan.

The loan was divided into two parts. The first part of the loan, which was set to close on June 15, 1988, was for the purchase of the property. The second part of the loan, which was to close at a later date, was for development costs.

On the evening of June 14, 1988, Ridenour called Dodson at his house, and informed him (for the first time) that he (and Mastercraft) would be unable to pledge any cash on the loan. At a meeting at Dodson's house that evening (at which Dodson, Ridenour, and Bramble were present), Ridenour informed the others that all of his cash was tied up in the construction of eight custom houses[1/] and that he would not be able to provide the cash until August when he closed on the houses. Dodson and Bramble agreed that the other three parties would "front" the money for the loan, with Ridenour paying them back in August. Bramble agreed to contact Beaver in the morning (since, by that time, it was very late in the evening) and inform him of the new arrangements.

At some point on June 15, 1988, Dodson asked the loan officer at First Tulsa about the possibility of closing the loan without Ridenour. The loan officer informed him that that would be virtually impossible due to time constraints (the closing was set for that day).

On June 15, 1988, Ridenour and Dodson met again. Ridenour explained that he was having severe cash flow problems and asked whether the "partnership" (meaning Dodson, Bramble and Beavers) would loan him $150,000. According to Dodson, Ridenour made a threat, suggesting that he might not sign the loan

---

[1/] Ridenour testified that not all of the houses under construction were "custom" houses. According to Ridenour, four or five of the houses were custom, and the others were "specs." A custom house is built for a specific customer, and is "sold" prior to the start of construction. "Spec" houses are built by a builder with no specific customer in mind, are not sold before the start of construction, and are hence more "speculative." Dodson testified that Ridenour represented that he had custom houses under construction. Bramble understood that the houses were custom houses, and testified that Ridenour represented that the money would be provided in August when Ridenour closed on the houses.

documents (and therefore prevent the closing) if the requested money was not loaned to him. Dodson called Brumble and Beavers. Both Brumble and Beavers disapproved of loaning any money to Ridenour, and Ridenour's request was denied.

The "first-half" of the loan (to purchase the acreage) was closed on June 15, 1988. Dodson, Bramble, and Beavers each contributed $133,333.33. The parties additionally executed a partnership agreement (for the Southern Oaks Development Partnership, hereafter "Partnership") which had been previously prepared by Ridenour's attorney.

Some time within the next week the parties met with the loan officer to discuss the "second-half" of the loan (for development). The parties were informed that only first mortgages on real estate, for a total amount of $400,000, would be acceptable as collateral for the second-half of the loan. Bramble and Beavers agreed to grant first mortgages on rental property, and Dodson agreed to put up his "second-half" in cash.

Ridenour informed the parties that he did not have the ability to grant a first mortgage on property and that he had no available cash. Ridenour explained that his money was tied up in the construction of the eight custom houses, but that he would have funds in August.

The second-half of the mortgage closed on July 29, 1988. Beavers and Bramble gave first mortgages on real estate (total value $250,000), and Dodson provided an additional $150,000 in cash. Ridenour did not contribute, promising to pay his portion in August after he closed on the homes.

In August, Ridenour failed to contribute his share of the collateral.[2/] In September, Dodson contacted Ridenour asking him about his ability to contribute his portion. Ridenour explained that he was attempting to sell 50% of Mastercraft to a Florida investor for $300,000, and that he would then be able to contribute his share. This sale did not take place.

On November 3, 1988 the partners drafted a letter to Ridenour expelling him from the Partnership. The letter was mailed by certified mail, but was returned as unaccepted. Dodson personally delivered the letter to Ridenour on November 29, 1988.

Ridenour and Mastercraft filed an action in state court on June 14, 1990 against Dodson, Bramble, and Beavers, alleging that he (and Mastercraft) were wrongfully expelled from the Partnership. On January 11, 1991 Ridenour filed for relief under Chapter 7 of the Bankruptcy Code. On November 22, 1993, Ridenour/Mastercraft requested relief under Chapter 11 of the Bankruptcy code. On November 29, 1993, Appellant filed an adversary proceeding against the Partnership and its partners alleging the same cause of action previously alleged in the state court proceeding. Appellant appeals from the decision of the Bankruptcy Court in the adversary proceeding.

[2/] Two of his homes were not completed and were foreclosed upon. Although the remaining were apparently sold, the record does not indicate what funds, if any, that Ridenour received from their sale.

II. STANDARD OF REVIEW

The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. Conclusions of law are reviewed *de novo*. Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988).

Appellant additionally urges that the Bankruptcy Court erred by finding that Appellant committed fraud, and urges that this ruling should be reversed under both the "clearly erroneous" and *de novo* standards.

Proof of fraud requires "clear and convincing" evidence. As noted, on appeal the Bankruptcy Court's findings of fact are reviewed under the clearly erroneous standard. Consequently, the Court will analyze the Bankruptcy Court's factual findings to determine whether any findings are clearly erroneous. The Court will then analyze all factual findings (which are not "clearly erroneous") to determine whether such facts constitute fraud (under the "clear and convincing" standard).

III. ANALYSIS

APPELLANT'S FAILURE TO DISCLOSE HIS INABILITY TO CONTRIBUTE CASH COLLATERAL

Appellant initially asserts the trial court erroneously found that the first time that Ridenour informed the other partners that he would be unable to provide the required collateral was on the evening of June 14, 1988. Appellant contends that because Ridenour told the other partners of his financial situation at a meeting on May 11, 1988, the trial court's finding is clearly erroneous. Ridenour relies on testimony from Beavers to support his argument. However, the trial court's findings are not clearly erroneous and are supported by the record.

Initially, the testimony of both Dodson and Beavers supports the trial court's finding that the first time Appellant informed the other partners of his inability to meet the collateral requirement was on the evening of June 14, 1988. *[Tr. at 41-42, 59, 224, 235-241].* Although Appellant quotes from a portion of Beavers' testimony, the quotations, which are taken out of context, do not support Appellant's conclusion that the trial court's factual finding was clearly erroneous.[3/] Regardless, Appellant testified that the first time that he told the other parties that he would not have the required collateral was the evening of June 14, 1988.

> WITNESS: We were told on the 14th that First Tulsa would [make the loan] with a substantial amount of collateral and that day I told Mr. Dodson I couldn't provide that part -- I couldn't provide the capital.
> THE COURT: The night of the 14th.
> WITNESS: Yes, sir.

[3/] The text of Mr. Beavers' testimony appears below. *[Tr. at 224-27].* The underlined portions indicate the text which Appellant relies upon to support his argument.
"Q: When did you first become aware . . . that Mastercraft was having financial difficulty?
A: I suppose it was on the morning of May 15th when Mr. Brumble called me.
Q: Are you sure about that month?
A: June 15th.
Q: Go ahead.
A: June the 15th. When Mr. Brumble called me and indicated to me that it was told to him by Mr. Dodson that we were to close on the 15th, that Mr. Ridenour did not have his part of the funds to put up on the partnership.
Q: And you first learned that then on June the 15th?
A: Yes.
***
Q: Did you have any direct conversations with Mr. Ridenour?
A: Other than he told us at our May 11th meeting that he would -- that is just where his money was.
Q: Well, you backed up on me a little bit. May 11th is quite a bit before June 15th.
A: Well, I was aware that he did not have the money, yes. Because we discussed that on the 15th when we agreed to carry him.
Q: When did you first become aware that Mastercraft didn't have any money to pledge as additional collateral on the development loan?
A: I think on the morning of June 15th."
Although Beavers' testimony may have been a bit confusing, he testified that the first time he became aware of Ridenour's lack of collateral was on June 15, 1988. The trial court's finding that the first time Ridenour told the parties of his lack of funds was on June 14, 1988 is not clearly erroneous.

> THE COURT: The night of the 14th and that was the first time that you said that you couldn't come up with the collateral?
> WITNESS: That is the first time --

[Tr. at 170-71.] The trial court's conclusion that Appellant waited until June 14, 1988, before informing the parties that he would be unable to contribute the required collateral is not clearly erroneous.

FIDUCIARY DUTIES OWED BY MASTERCRAFT TO THE OTHER PARTNERS

Appellant additionally contends that the trial court improperly determined that potential partners to a partnership agreement have a fiduciary duty to disclose financial information prior to the formation of a partnership. The trial court found, under the facts of this case, that Appellant breached certain duties which were owed to the Appellees.

Initially, the trial court correctly determined that partners owe certain fiduciary duties to each other prior to the formation of the partnership. In Knapp v. First Nat. Bank & Trust Co., 154 F.2d 395 (10th Cir. 1946), the Tenth Circuit Court of Appeals noted that "[t]he relationship between partners is fiduciary and it imposes on them the obligation of the utmost good faith and integrity in their dealings with one another with respect to partnership affairs. Such duty of good faith exists also between persons who are about to become partners."[4/] See also Tindale v. Blatnik, 101 B.R. 718 (E.D. Okla. 1989); Waller v. Henderson, 275 P. 323, 325 (Okla. 1929).

[4/] The Tenth Circuit's opinion was based on a case from West Virginia, two earlier Oklahoma cases, and the Oklahoma statute (from 1941). Oklahoma's statute has since been replaced by the Uniform Partnership Act.

Furthermore, this fiduciary duty requires potential partners to disclose material facts relating to the partnership during the formation of the partnership. See In re S & D Foods, Inc., 144 B.R. 121 (D. Col. 1992) ("Thus, during negotiations, each party to a future or potential fiduciary relationship has a duty to make full disclosure to the other parties concerning matters that have induced them to enter into the relationship."). Consequently, the trial court correctly determined that a partner's pre-formation fiduciary duty includes a duty to fully disclose to prospective partners information concerning matters which have induced the parties to enter into the relationship.

Based on the facts in this case, the trial court concluded that Ridenour/Mastercraft breached this fiduciary duty on two occasions. First, Ridenour failed to disclose his inability to contribute the required financial requirements until it was too late to form the Partnership without him, although he was aware (in early May) that he would be unable to contribute his share. Second, Ridenour promised the parties that he would contribute $300,000 to the Partnership (for the collateral on the loan) from funds he would receive when he closed on the houses he was constructing, although he knew or should have known that he would not have sufficient funds in August.

Appellant contends that the trial court's finding that Ridenour knew but failed to disclose his financial difficulty in May is not true because in May 1988 "everybody, including all other partners . . . . believed Mastercraft was in good financial shape." *Appellant's Reply Brief, filed May 16, 1995 at 4-5.* However, Ridenour testified that

in early 1988 Mastercraft's financial condition was "somewhat tenuous." *[Tr. at 157.]* According to Ridenour, he had been involved in a project with Triad Bank in 1987 which was not as profitable as he had planned. *[Tr. at 157.]* When he discovered he was going to be underfunded for the project, he borrowed an additional $380,000 from the bank. *[Tr. at 159-160.]* Ridenour additionally testified that Mastercraft did not have enough working capital in early 1988, and had to keep projects going to keep bills paid. *[Tr. at 161-61.]* The trial court's findings that Appellant knew he would be unable to contribute the required capital but failed to disclose his financial condition are not clearly erroneous.

Appellant additionally asserts that the trial court's conclusion that Mastercraft had insufficient "equity" in the houses it was constructing and knew it would have insufficient funds in August to contribute its portion of the partnership capital is not supported. *Appellant's Reply Brief, filed May 16, 1995 at 9.* Appellant testified that he never promised to pay the collateral in August, that he had a $350,000 loan at Triad Bank at the time that he had to pay off, that not all of the houses under construction were custom houses, and that he promised the other partners if he had any money after closing on the homes he would contribute. *[Tr. at 173-74, 181-83.]* Both Dodson and Bramble testified that Appellant represented that his money was currently tied up in the construction of eight custom houses, that he would be closing on the houses in August, and that after closing on the homes he would have sufficient funds to pay his portion of the collateral. *[Tr. at 59-67, 105-06, 213-14, 246.]* The trial court's conclusions are not clearly erroneous.

MASTERCRAFT'S COMMISSION OF FRAUD

Appellant asserts that Mastercraft did not fraudulently induce the other parties to enter the Partnership, but that Appellant's participation was mandated by the lender. The trial court determined that Appellant failed to properly disclose his true financial condition until the evening before closing when it was too late to exclude Mastercraft from the arrangement. The trial court's findings are supported by the record and are not clearly erroneous.

Appellant further argues that Appellees failed to establish the elements of fraud by clear and convincing evidence. Oklahoma contract law recognizes both actual and constructive fraud.

> Actual fraud, within the meaning of this chapter, consists in any one of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:
>
> 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.
> 2. The positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believe it to be true.
> 3. The suppression of that which is true, by one having knowledge or belief of the fact.
> 4. A promise made without any intention of performing it; or,
> 5. Any other act fitted to deceive.

15 O.S. 1991, § 58 (emphasis added).

> Constructive fraud consists:
>
> 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by

misleading another to his prejudice, or to the prejudice of any one claiming under him; or,

2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

15 O.S. 1991, § 59.

"[I]t is a general rule that in order to constitute actionable fraud, a false representation must relate to a present or preexisting fact and cannot ordinarily be predicated on representations or statements which involve mere matters of futurity." United States v. Stanolind Crude Oil Purchasing Co., 113 F.2d 194 (10th Cir. 1940). However, Oklahoma has recognized an exception to this "general rule."

> Oklahoma follows the view that fraud can be predicated upon a promise to do a thing in the future when the intent of the promisor is otherwise. This principle is an exception to the general rule that for a false representation to be the basis of fraud, such representation must be relative to existing facts or those which previously existed, and not as to promises as to future acts. . . . [T]he exception to the general rule obtains where the promise to act in the future is accompanied by an intention not to perform and the promise is made with the intent to deceive the promisee into acting where he otherwise would not have done so. The gist of the rule is not the breach of promise but the fraudulent intent of the promisor at the time the pledge is made not to perform the promise so made and thereby deceive the promisee.

Citation Company Realtors, Inc. v. Lyon, 610 P.2d 788, 790 (Okla. 1980) (citations omitted).

According to Appellant, Appellant's "promises" to the Partnership were contingent promises based on the occurrence of a future event and therefore cannot constitute actionable fraud. The trial court found that Ridenour's actions were

"tantamount to fraud" and that Ridenour made representations which he did not intend to keep.

> Ridenour's actions induced the other parties to allow Debtor [Mastercraft] into the partnership and to remain as a member. Had the parties known the truth, Debtor would not have been included in the partnership. Ridenour's overall intent throughout the parties' relationship was to have Debtor share in the profits of the partnership without sharing in the risks. In essence, Ridenour wanted Debtor to have a free ride.

[Trial Court's opinion at 13 (emphasis added).]

Oklahoma recognizes, as fraud, the making of a promise when one has no intention of keeping the promise. The trial court's findings fit the exception outlined by the court in Citation. The trial court determined that Ridenour, at the time he made the promises, and "throughout the parties' relationship" did not intend to pay his portion of the collateral. These factual findings are not clearly erroneous.

ALLEGED WAIVER OF THE RIGHT TO RESCIND THE PARTNERSHIP AGREEMENT

Appellant argues that upon discovery of the fraud, the Appellees had a duty to act promptly and by not promptly acting waived their right to rescind the partnership agreement. Appellant suggests that Appellee, by not acting to exclude Appellant from the Partnership before the development portion of the loan (the "second-part" of the loan) was closed on July 29, 1988, "ratified" the Partnership.

However, the trial court found that Appellant led the partners to believe that he would contribute his portion of the collateral when he closed, in August 1988, on the houses that he had under construction. The trial court additionally found that

Dodson contacted Ridenour in September, and that Ridenour informed Dodson that he was trying to sell a portion of his business, would receive a large amount of capital, and would then be able to contribute his share. On November 3, 1988, Appellees wrote a letter to Mastercraft expelling him from the Partnership for failing to contribute its share.[5/] Under the facts, the trial court did not err by failing to find that Appellees waived any rights to rescind the Partnership agreement.

APPLICATION OF OKLAHOMA LAW

Appellant asserts that the trial court ignored Oklahoma law and further argues that no cases support the recision of a partnership. Appellant's arguments ignore the trial court's findings that Appellant committed fraud. In addition, in Hanes v. Giambrone, 471 N.E.2d 801 (Ct. App. Ohio 1984),[6/] the court, based on the Uniform Partnership Act, permitted recision of a partnership agreement due to the fraudulent acts of a party.

> Where one is induced to form a partnership by reason of the fraud or misrepresentations of another, a court of equity will, on the application of the injured party and after the deceit becomes known, rescind the contract of partnership. To be entitled to the remedy of recision, the defrauded party must act promptly upon the discovery of the fraud. While the Uniform Partnership Act does not expressly authorize dissolution for fraud, it appears to assume the availability of this remedy by providing for certain consequences when a partnership contract is rescinded on the ground of fraud.

[5/] The letter was sent certified mail, but returned "unaccepted." Dodson personally delivered the letter to Ridenour on November 19, 1988.

[6/] Appellant relies on this case to support Appellant's argument that the Appellees' failure to act promptly constituted a waiver.

Id. at 807 (citations omitted). See also Knapp v. First Nat. Bank & Trust Co., 154 F.2d 395, 397 (10th Cir. 1946) ("[T]here is little doubt that a court of equity has jurisdiction, where a person has been induced, by fraudulent representations, to enter into a partnership, to rescind the contract at his instance, and, as between the partners, put an end to it ab initio."). In addition, Oklahoma recognizes the right of recision as a remedy for contracts entered into based on fraud. 15 O.S. 1991, § 233. The trial court did not err by finding that Appellant was not a member of the Partnership.

ADMISSION OF PAROL EVIDENCE

Appellant asserts that the trial court erred in admitting evidence because the agreement of the parties was reduced to writing (the June 15, 1988 Partnership agreement), and all other evidence is extraneous parol evidence which is inadmissible. However, Oklahoma permits the admission of parol evidence under some circumstances.

> Under the terms of 15 O.S. § 137, referred to generally as the parol evidence rule, testimonial evidence may be admissible to vary or contradict the terms of a written contract when fraud, accident or mistake is relied upon for relief from the binding effect of a contract.

Snow v. Winn, 607 P.2d 678, 681 n.9 (Okla. 1980).

Appellant, in its Reply Brief seems to acknowledge this exception to the parol evidence rule, but states "Appellees simply did not prove fraud. Appellees are therefore not entitled to the exception to the parol evidence rule. . . ." *[Appellant's Reply Brief at 10.]* This position makes Appellant's argument contingent on this Court

holding that the trial court erred in concluding that Appellant's conduct was fraudulent. As discussed above, the trial court's findings were not error.

Accordingly, the decision of the Bankruptcy Court is **AFFIRMED**.

Dated this 8th day of March 1996.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PRESTON D. GARNER aka Preston Dale Garner; JAMIE J. GARNER aka Jamie Juanella Garner; UNKNOWN SPOUSE OF Preston D. Garner aka Preston Dale Garner; UNKNOWN SPOUSE OF Jamie J. Garner aka Jamie Juanella Garner; JAMES M. GOTT aka James Myer Gott;COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

MAR 0 8 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

Civil Case No. 95-C 282K

EOD 3/11/96

ORDER CONFIRMING SALE

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed February 21, 1996, in which the Magistrate Judge recommended that the Motion to Confirm Sale be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and is affirmed.

It is therefore **ORDERED** that the Motion to Confirm Sale is granted.

Dated this 7 day of March, 1996.

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT'S COUNSEL TO ALL PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

S/ TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DWAYNE Y. TAPP aka Dewayne Y. Tapp; PHYLLIS J. TAPP; UNITED BANKERS MORTGAGE CORPORATION; FIRSTBANK MORTGAGE CO.; NEW YORK GUARDIAN MORTGAGEE CORP.; GOVERNMENT NATIONAL MORTGAGE ASSOCIATION; AMERICAN FUNDING CORP., INC.; SECURITY PACIFIC FINANCE CORP.; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

MAR 0 8 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

Civil Case No. 95-C 0099K

EDO 3/11/96

ORDER CONFIRMING SALE

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed February 21, 1996, in which the Magistrate Judge recommended that the Motion to Confirm Sale be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and is affirmed.

It is therefore **ORDERED** that the Motion to Confirm Sale is granted.

Dated this 7 day of March, 1996.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE MAILED ... AND ... IMMEDIATELY ...

FILED
MAR 8 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY DALE, PLAINTIFF, VS. RONALD J. CHAMPION, and MARY CARTER, DEFENDANTS.	)	CASE NO. 95-C-190-B
LARRY DALE, PLAINTIFF, VS. BRAD PAYAS, and PAULA POTTS, DEFENDANTS.	)	CONSOLIDATED WITH CASE NO. 95-C-191-B

ENTERED ON DOCKET
MAR 11 1996

O R D E R

This matter comes on for consideration of Plaintiff's objections to the Reports and Recommendations entered in the above captioned cases. Because the issues in each case are essentially the same and because the Report and Recommendation in the higher numbered case recommended that such case be dismissed because of the identicality of issues between the cases, the Court herein will treat these consolidated cases, and the objections to the Reports thereto, as one matter.

In these cases Plaintiff, serving life for murder, complains under 42 U.S.C. § 1983 that Defendants are collectively guilty of

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deliberate indifference to Plaintiff's alleged legitimate and serious medical needs by allowing an alleged unpracticed person, Paula Potts, to draw blood from Plaintiff's arm in a routine medical examination. Plaintiff alleges that Potts, on October 25, 1994, injured Plaintiff's arm while drawing the blood, causing bleeding, soreness and pain.

In response, Defendants asserted in the Martinez Report that the secretary who drew Plaintiff's blood, Ms. Potts, had been properly trained to draw blood, and supports this assertion with the statements of Paula Potts and her previous employer, Michael Mitchell, D.O., who reported that during Ms. Pott's prior employment with him, he had trained her in the proper manner and method to draw blood and that she drew blood on a regular basis in his private medical practice.

As a general premise, prison officials who are deliberately indifferent to a prisoner's serious medical needs violate the Eighth Amendment's prohibition against cruel and unusual punishment. Estelle v. Gamble, 429 U.S. 97 (1976). Deliberate indifference has two elements: (1) an objective showing as to pain and deprivation which must be sufficiently serious; and (2) a subjective standard requiring a showing that the offending officials act with a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294 (1991).

In the present case the Magistrate Judge determined in his Report and Recommendation that Plaintiff had failed to establish either of the required components stated above. The Court agrees. Even if the Plaintiff's blood had been unartfully drawn, causing

temporary pain, such an allegation would fail to demonstrate that the pain or deprivation was sufficiently serious to invoke the Eight Amendment's cruel and unusual punishment prohibition. Further, the Plaintiff has totally failed to establish the subjective element required. In addition, even if Plaintiff could have established that the State official drawing his blood was negligent in performing that procedure, such would be insufficient to establish an Eight Amendment violation since neither simple nor gross negligence meets the deliberate indifference standard required for a violation of the cruel and unusual punishment clause of the Eight Amendment. Estelle, at 104-105.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322. 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

> "[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant

"must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., *supra*, wherein the Court stated that:

> ". . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

The Court concludes Defendants' motion for summary judgment should be and the same is hereby GRANTED. The Court adopts and affirms the Reports and Recommendations of the Magistrate Judge.

IT IS SO ORDERED this 8th day of March, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE